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NO. 05-

IN THE SUPREME COURT OF THE
UNITED STATES

DAVIESS COUNTY, KENTUCKY
Petitioner

v.

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), this Court held that a "flow control" ordinance violated the dormant Commerce Clause. In *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245 (2nd Cir. 2001), the Court interpreted *Carbone* as applicable only if a state or local ordinance favored local private business interests over out-of-state interests. Based upon the interpretation of *Carbone* in the *United Haulers* case, which was not adopted by the Sixth Circuit here, the question presented is:

Whether Daviess County's ordinance, which directed all solid waste generated within Daviess County to be deposited in Daviess County's publicly owned landfill, violated the Commerce Clause.

RULE 29.6 STATEMENT

The Petitioner is a governmental body, and thus Rule 29.6 does not apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daviess County, Kentucky, a political sub-division of the Commonwealth of Kentucky, respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported as *National Solid Waste Management Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). Daviess County's Petition for Rehearing was denied in an Order and Opinion reported at 446 F.3d 647 (6th Cir. 2006).

The decision on appeal before the Sixth Circuit was rendered by the United States District Court, for the Western District of Kentucky. That court granted the respondent Summary Judgment in a decision that was unreported.

JURISDICTION

The Judgment of the Sixth Circuit was entered on January 24, 2006. Daviess County filed a timely Petition for

Rehearing. This Petition was denied in an Order entered March 30, 2006. The jurisdiction of the Sixth Circuit was pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed, pursuant to Supreme Court Rule 13.3, as within ninety (90) days of the Order denying Daviess County's Petition for Rehearing.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Daviess County Ordinance KOC 830.5(2004) provides, in relevant part, that:

1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its jurisdiction through the grant of nonexclusive franchises.

2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.

3. Nonexclusive franchises shall be granted to all haulers that are properly registered in accordance with KRS 224.43-315(2), have properly

filed an annual report as required by KRS 224.43-315(3), and are in compliance with all other applicable laws and regulations.

4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted by a franchise by Daviess County Fiscal Court.

5. For the purposes of this ordinance, Municipal Solid Waste shall mean Household Solid Waste and Commercial Solid Waste, as defined in KRS 224.01-010(31).

6. This ordinance shall become effective July 1, 2004, or 60 days following the issuance of a Declaratory Judgment upholding the ordinance by the United States District Court for the Western District of Kentucky, whichever is later.

Article 1, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

Daviess County is a political subdivision of the Commonwealth of Kentucky. Daviess County's Fiscal Court is responsible to "carry out governmental functions necessary for the operation of the county." Kentucky Revised Statute[1] 67.083(3). Pursuant to KRS 67.083(3)(o), Kentucky counties are given "exclusive management of solid waste by ordinance or contract or by both...".

As further set forth in KRS Chapter 109.011(6), the "primary responsibility" for solid waste "collection, management, treatment, disposal, and resource recovery" rests with the counties and solid waste management districts. KRS 109.011(11) further provides the counties with authority to develop a "solid waste management system for solid waste generated within the geographical borders of the county...". (Id.)

In KRS 109.041(1), counties are given the authority to, among other things, "construct and maintain solid waste facilities". This statute further provides that, in the "implementation, acquisition, financing, and maintenance of solid

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[1] Hereinafter "KRS".

waste management facilities, and in the enforcement of their use, counties will be performing state functions duly delegated to them for the public welfare." KRS 224.40-100(1) and KRS 224.40-305 require a permit, from the Commonwealth, for any solid waste disposal facility. Disposal of waste at any site or facility other than a permitted facility is prohibited. (Id.)

In accordance with the above cited authority, Daviess County implemented a comprehensive waste management program. This program included the construction and operation of a sanitary landfill, owned by the County, that was duly permitted by the Commonwealth of Kentucky in 1994. Prior to construction and operation of that landfill, Daviess County complied with the provisions of KRS 224.40-310, concerning the permit/application process itself with the Cabinet. Daviess County's landfill is the only state-permitted landfill in Daviess County.

In 2002, the Kentucky General Assembly enacted KRS 224.43-315. It required each county, including Daviess County, to provide a universal solid waste collection program "for all municipal solid waste generated within the county" by October 1, 2003. KRS 224.43-315(1) It also required

that all persons providing solid waste collection services to register annually with the counties in which they provide the service and, further, to provide information regarding the amount of waste collected. The county is then required to submit an annual report to the Cabinet[2] "detailing its solid waste collection activities...".

In accordance with the above statutory obligations and mandates, Daviess County enacted Ordinance KOC 830.5 on February 19, 2004. The Ordinance provides that the Fiscal Court "shall provide universal municipal solid waste collection within its jurisdiction through the grant of non-exclusive franchises." The franchise agreements required any party providing solid waste collection to "dispose of the waste they collect at the Daviess County Landfill or Transfer Station." All such haulers had to be properly registered, in accordance with KRS 224.43-315, including filing the required reports. The Ordinance further provided that no hauler could collect solid waste in Daviess County except pursuant to the registration provisions of the Ordinance. The Ordinance was effective July 1, 2004, or 60 days following a

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[2] The "Cabinet" is the "Natural Resources & Environmental Cabinet."

declaratory judgment upholding the Ordinance by the United States District Court, whichever date was later.

National Solid Waste Management Association ("NSWMA") is a trade association, representing the interests of the solid waste disposal industry. As part of its Complaint in the District Court, it alleged membership organizations in all 50 states, including Republic Services of Kentucky, LLC. NSWMA alleged that Republic was engaged in the collection, transportation, and disposal of solid waste generated in Daviess County, Kentucky.

Republic of Kentucky, LLC, doing business as B&J Sanitation, and 15 other haulers, properly registered with Daviess County under this Ordinance. B&J Sanitation deposits solid waste that it collects in Daviess County in a Republic-owned landfill in Kentucky. None of the other haulers in Daviess County deposit their solid waste in a landfill outside of Kentucky.

NSWMA filed its suit, seeking to declare Daviess County's Ordinance unconstitutional, on March 29, 2004. It contended that Daviess County's Ordinance, which mandated that all solid waste collected within Daviess County must be deposited in Daviess County's publicly owned and financed

landfill, discriminated against the "interstate market for solid waste disposal services by favoring disposal facilities owned by Daviess County and located in Daviess County over facilities owned by NSWMA members both inside and outside of Daviess County". NSWMA contended that Daviess County had other means, besides its Ordinance, to advance its legitimate interest in solid waste disposal.

Daviess County contended that its Ordinance was facially neutral. Further, since it financed, owned, and maintained its own landfill, no dormant Commerce Clause discrimination occurred because its ordinance did not favor any local private business entity over any non-local, or interstate disposal facility. Daviess County further claimed that its Ordinance took over the disposal market for solid wastes , but did not affect the collection market for solid wastes. As such, Daviess County contended that its Ordinance was facially valid and did not unduly burden interstate commerce.

In a Memorandum Opinion and Order, along with a companion Judgment entered the same date of November 19, 2004, the District Court for the Western District of Kentucky granted NSWMA's motion for summary judgment. The District Court determined that Daviess County's Ordinance

facially discriminated against interstate commerce. The District Court declared the ordinance unconstitutional and enjoined its enforcement. Daviess County then appealed to the Sixth Circuit.

The Sixth Circuit upheld the District Court in all respects. Daviess County now requests that this Court review the decision of the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN THE UNITED HAULERS CASE THAT *CARBONE* IS LIMITED ONLY TO FLOW CONTROL LAWS THAT BENEFITTED A PRIVATE ENTITY BUT THAT THE COMMERCE CLAUSE IS NOT VIOLATED IF THE DISPOSAL FACILITY IS OWNED BY A STATE OR LOCAL GOVERNMENTAL ENTITY.

In *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), this court invalidated a town ordinance that required all solid waste generated within that town to be disposed of at a transfer station built and operated by a local contractor. The contractor was then to sell the facility to the town after five years for a nominal price. Carbone, a waste recycler, was shipping waste to a landfill in another state.

This Court determined that the town's ordinance discriminated in favor of a "single local proprietor" and was thus unconstitutional under the Commerce Clause. Because the ordinance was determined to be facially invalid, the court did not find it necessary to reach the *Pike*[3] "balancing" test.

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3 *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970)

Courts have not interpreted *Carbone* as imposing a "per se" law on any law that established flow control for solid waste. Under a variety of legal theories, ordinances which directly, or indirectly, establish some form of flow control have been upheld against challenges based upon *Carbone*. See: *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1997) *Cert denied* 517 U.S. 1135 (1996); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); and indirectly in *Maharg, Inc. v. VanWert Solid Waste Management District*, 49 F.3d 544 (6th Cir. 2001) *Cert denied* 534 U.S. 1079 (2002).

Other circuits declined to uphold such laws, claiming they ran afoul of Carbone's interpretation of the Commerce Clause. Some of these cases are even within the same circuits that, as identified above, upheld flow control laws under other circumstances. See: *SSC Corp v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995); *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997); *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson*

County, 130 F.3d 731 (6th Cir. 1997) *cert denied* 523 U.S. 1094 (1998); and *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707 (6th Cir. 2000).

In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2nd Cir. 2001), *cert. denied* 534 U.S. 1982 (2002), ("United Haulers I")[4] the court reviewed dormant Commerce Clause decisions and determined that the "common thread of Commerce Clause jurisprudence was that the local law discriminates against interstate commerce when it hoards local resources in a manner that favors local business, industry or investment over out-of-state competition." (261 F.3d at p. 261, emphasis in original). The court went on to hold that a "flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interest over out-of-state interest."(*Id.*, p. 263).

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[4] Following remand for purpose of the *Pike* test, the case was then affirmed on that ground. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 438 F.3d 150 (2nd Cir. 2006). ("United Haulers II".)

This conclusion amplified its earlier determination that a "municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publically owned facilities." (261 F.3d at p. 257)

United Haulers I was followed in *East Coast Recycling, Inc. v. City of Port St. Lucie*, 234 F.Supp.2d 1259 (So. D. Fl. 2002). But United Haulers I was rejected in *National Solid Waste Management Ass'n v. Pine Belt Solid Waste Management Authority*, 261 F.Supp. 2d 644 (S. D. Miss. 2003) *rev'd in part on other grounds in* 389 F.3d 491 (5th Cir. 2004).

Following the Second Circuit's affirmance of United Haulers I in United Haulers II, the commercial haulers in that case have now petitioned this Court for a Writ of Certiorari. This is pending as Case No. 05-1345, filed April 21, 2006.

In reviewing Daviess County's arguments that the Court should recognize the public/private ownership distinction of *United Haulers*, the Sixth Circuit declined to do so. Although it acknowledged that its prior cases within the Circuit had not directly addressed this issue, it nonetheless held that a "necessary implication" of its prior decision was

that "public ownership did not change the dormant Commerce Clause inquiry." (434 F.3d at p. 910) Further, the Sixth Circuit also disagreed with the analysis of the Second Circuit in the *United Haulers* decision.

Pursuant to Supreme Court Rule 10(a), Daviess County submits that the Sixth Circuit Opinion entered below is in conflict with the Second Circuit Opinion in the United Haulers I. The respective courts have come to different conclusions on whether a law, enacted by a state or local governmental entity, runs afoul of the dormant Commerce Clause if it directs solid wastes to a publicly owned facility for transfer or disposal. This split in Circuits presents an important federal question on the interpretation of the dormant Commerce Clause. Resolving the splits in Circuits will provide guidance to the lower federal courts, as well as to the state courts, and state and local governments.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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App. Page(s)

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Order and Opinion of the Court Denying Petition for
Rehearing of March 30, 2006 .....App. pp.28-35

United States Court of Appeals,Sixth Circuit.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, Plaintiff-Appellee,
v.
DAVIESS COUNTY, KENTUCKY, Defendant-Appellant.
No. 04-6498.

Argued: Nov. 29, 2005.
Decided and Filed: Jan. 24, 2006.
Rehearing En Banc Denied March 30, 2006.

Before: CLAY and COOK, Circuit Judges; COOK, District Judge. FN*

FN* The Honorable Julian A. Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

CLAY, Circuit Judge.

Defendant Daviess County, Kentucky appeals the November 19, 2004 order of the United States District Court for the Western District of Kentucky granting summary judgment for Plaintiff National Solid Wastes Management Association ("NSWMA"), declaring proposed Daviess County Ordinance 830.5 ("Ordinance") unconstitutional, and enjoining the County from enforcing the terms of the Ordinance. For the reasons set forth below, this Court AFFIRMS the district court order.

I. BACKGROUND

A. PROCEDURAL HISTORY

On March 25, 2004, Plaintiff filed a complaint against Defendant that sought a declaratory judgment that the Ordinance was unconstitutional because it violated the dormant

Commerce Clause and a permanent injunction barring Defendant from enforcing the Ordinance against Plaintiff's members.

Both parties filed motions for summary judgment.

On November 19, 2004, the district court granted Plaintiff's motion for summary judgment, denied Defendant's motion for summary judgment, issued a declaratory judgment that the Ordinance was unconstitutional, and issued a permanent injunction barring Defendant from enforcing the terms of the Ordinance.

On December 17, 2004, Defendant timely filed a notice of appeal.

B. FACTS

The facts are not in dispute. Defendant is a county located in Kentucky. Under Kentucky law, Defendant is responsible for developing and implementing solid waste management plans for the county. Ky.Rev.Stat. Ann. § 109.011(9) (West 2005). Pursuant to this responsibility, Defendant enacted the Ordinance on February 19, 2004. The Ordinance states, in relevant part:

1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its jurisdiction through the grant of nonexclusive franchises.
2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.
3. Nonexclusive franchises shall be granted to all haulers that are properly registered in accordance with KRS 224.43-315(2), have properly filed an annual report as required by KRS 224.43-315(3), and are in compliance with all other applicable laws and regulations.

4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted a franchise by Daviess County Fiscal Court.

Plaintiff is a trade association whose members are "engaged in various aspects of solid waste management, including the collection, transportation and disposal of municipal solid waste generated in Daviess County." (J.A. at 8.) One of these members is Republic Services of Kentucky, LLC ("Republic"). Republic currently conducts business in Daviess County as a waste collector, and it disposes of this waste either at Plaintiff's transfer station or at a Kentucky landfill owned by Republic. Plaintiff claims that its members operating within Daviess County as waste collectors may need to dispose of waste in the future at out-of-state disposal sites. Plaintiff also claims that its members who operate out-of-state waste disposal sites will be unable to participate in the waste disposal market for Daviess County.

II. DISCUSSION

A. STANDING

This Court has an independent obligation to determine whether it has subject matter jurisdiction over a case, including whether Plaintiff meets the requirements of constitutional and prudential standing. *In re Cannon*, 277 F.3d 838, 852 (6th Cir.2002). This Court reviews these standing issues *de novo*. *Id.* (citing *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501, 507 (6th Cir.2001)).

1. Constitutional Standing

Under Article III, Plaintiff must demonstrate three components to establish standing: "(1) an injury in fact that is actual or threatened; (2) a causal connection between the defendants'

conduct and the alleged injury; and (3) a substantial likelihood that the injury will be redressed by a favorable decision." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 710 (6th Cir.2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

We find that Plaintiff has established constitutional standing. With respect to the first element, NSWMA members who are waste collectors in Daviess County would be prohibited from contracting with less expensive waste disposal sites under the Ordinance; in fact, member Republic, a waste collector in the county, also owns a waste disposal facility that it would be unable to use. Moreover, NSWMA members who own waste disposal sites cannot contract with waste collectors for disposal of solid waste that is generated within Daviess County. Thus, the Ordinance would work an actual injury on NSWMA members. With respect to the second element, a causal connection exists between Defendant's conduct and the injury; without the Ordinance, NSWMA members would be free to contract to dispose of waste at sites other than the County-owned disposal site or transfer station. With respect to the third element, a favorable decision would redress Plaintiff's injury, as an injunction against the enforcement of the Ordinance would allow NSWMA members to freely contract for waste disposal services.

2. Prudential Standing

In addition to the Article III requirements, Plaintiff must prove prudential standing; specifically, Plaintiff must demonstrate that the interest that it seeks to protect is " 'within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.' " *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). Here, Plaintiff claims Defendant's Ordinance is in violation of the dormant Commerce Clause.

The Supreme Court has explained that "[t]he central rationale for the rule against discrimination [under the dormant Commerce Clause] is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

We find that Plaintiff has met the prudential standing requirement. This Court has specifically held that the Commerce Clause protects a party's right to contract with an out-of-state waste disposal provider.[FN1] *Huish Detergents*, 214 F.3d at 711 ("In making this claim, [the plaintiff] is asserting its individual right ... to purchase waste processing and disposal services across State boundaries, an interest that falls squarely within the zone of interests protected by the Commerce Clause.")

FN1. The fact that Plaintiff has not shown that waste generated within Daviess County has actually crossed state lines is of no import with respect to prudential standing; the Commerce Clause protects the right to contract across state lines, not just the actual movement of goods or services across state lines. *See Huish Detergents*, 214 F.3d at 710-11. While one other circuit has seemingly required such actual movement, *see Nat'l Solid Waste Mgmt. Assoc. v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498-501 (5th Cir.2004), the law of this Court recognizes prudential standing where the plaintiff seeks to protect its right to contract for or purchase out-of-state goods or services.

B. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT THE ORDINANCE WAS FACIALLY DISCRIMINATORY AGAINST INTERSTATE COMMERCE

1. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo*. Odle v. Decatur County, 421 F.3d 386, 389 (6th Cir.2005) (citation omitted). The moving party must show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court "must view all the facts and the inferences drawn therefrom in the light most favorable to the nonmoving party." *Cummings v. City of Akron*, 418 F.3d 676, 682 (6th Cir.2005) (internal quotations and citation omitted).

2. Analysis

The district court did not err when it found that the Ordinance was facially discriminatory against interstate commerce. The Ordinance, in practical terms, is no different than other local laws struck down by the Supreme Court and this Court as unconstitutional.

a. Legal Framework

The United States Constitution gives Congress the power to "regulate Commerce ... among the several States." U.S. Const. art. 1, § 8, cl. 3. While the Constitution does not directly speak to the states' power to regulate commerce amongst themselves, the Supreme Court has long interpreted the Constitution as not only granting power to Congress to regulate interstate commerce, but also denying that same power to the states. *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949). As a result, this "dormant" Commerce Clause "limits the actions of municipalities ... where such actions 'burden interstate commerce or impede its free flow.' " FN2 *Waste Mgmt., Inc. v. Metro. Gov't.*, 130 F.3d 731, 735 (6th Cir.1997)

(quoting *Carbone*, 511 U.S. at 389, 114 S.Ct. 1677).

FN2. The dormant Commerce Clause must still be considered even in cases where there is a substantial local interest, as explained *infra*. *Amici* spend the majority of their brief extolling the virtues of flow control regulations in today's complex waste management landscape; however, the practicality of a regulation is hardly sufficient to correct its unconstitutional nature. Furthermore, if *amici* believe that the dormant Commerce Clause should not apply in the waste management context, *amici* need not endure the burden of constitutional amendment to achieve their ends; they can simply petition Congress, as Congress may approve of state and local regulations of interstate commerce.

By its nature, the dormant Commerce Clause only disallows local *regulation* of interstate commerce. If a local government action is market participation, as opposed to market regulation, then the action is not barred by the dormant Commerce Clause. *Huish Detergents*, 214 F.3d at 714. We agree with the Second Circuit that the proper inquiry to determine if a local government is engaged in market regulation is if "it exercises governmental powers that are unavailable to private parties.... Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior." *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255 (2d Cir.2001) (citation omitted).

If the local government meets this threshold inquiry and is engaged in regulation of interstate commerce, then the Court must determine whether the regulation discriminates against interstate commerce, or whether it "regulates evenhandedly." *Huish Detergents*, 214 F.3d at 712-13. "If an ordinance discriminates against interstate commerce by treating in-state and out-of-state interests differently, benefitting the former

and burdening the latter, it is *per se* invalid unless the State has 'no other means to advance a legitimate local interest.' " *Id.* (quoting *Carbone*, 511 U.S. at 392, 114 S.Ct. 1677). "On the other hand, if the law regulates evenhandedly, it will be upheld unless the burden it imposes on interstate commerce is 'clearly excessive in relation to the putative local benefits.' " *Id.* at 713 (quoting *Carbone*, 511 U.S. at 390, 114 S.Ct. 1677.) This is known as the *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

With this framework in mind, this Court addresses three relevant waste management cases. In *C & A Carbone v. Clarkstown,* the Supreme Court addressed the constitutionality of a town ordinance. There, the town of Clarkstown decided to build a waste transfer station, as it closed its local landfill in cooperation with the State of New York. 511 U.S. at 387, 114 S.Ct. 1677. The transfer station's purpose was to receive bulk solid waste, separate the waste between recyclable and nonrecyclable waste, and process these two types of waste for transport to the appropriate ultimate disposal destinations. *Id.*

The town hired a private contractor to build the transfer station. *Id.* Instead of paying for the transfer station with municipal funds, the town gave the private contractor the right to operate the station for five years. *Id.* At the end of the five years, the private contractor would sell the transfer station to the town for a nominal amount. *Id.* The town also guaranteed a minimum waste flow of 120,000 tons, and the town authorized the private contractor to charge a "tipping fee" of $81 per ton. *Id.* If the actual waste flow was less than 120,000 tons, the town would pay for the difference in revenues. *Id.*

In order to make good on its guarantee to the private contractor, the town passed an ordinance that required all nonhazardous solid waste from the town to be brought for processing to the transfer station. *Id.* The plaintiff, a recycling center in the

town, brought suit. *Id.* at 387-88, 114 S.Ct. 1677.

The Supreme Court found that the ordinance was unconstitutional. The Court held that the ordinance discriminated against interstate commerce, because "[i]t hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.* at 392, 114 S.Ct. 1677. In other words, without the ordinance, waste collectors would be free to take the waste to any number of transfer and disposal sites, including out-of-state sites. The ordinance thus "deprive[d] out-of-state businesses of access to a local market." *Id.* at 389, 114 S.Ct. 1677. The court found that the case did not fall into a narrow exception "in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392, 114 S.Ct. 1677.

In *Waste Mgmt., Inc.*, this Court followed the Supreme Court's lead in *Carbone*. There, the county enacted a "flow-control" regulation that required, among other things, that all residential waste collected within the county be disposed of at a "waste-to-energy" facility owned by the county. 130 F.3d at 733. This Court found *Carbone* to be directly on point and held that the regulation discriminated against interstate commerce, and that the county could have engaged in alternative, nondiscriminatory actions to meet its proffered local concerns. *Id.* at 736.

In *Huish Detergents, Inc. v. Warren County*, the Court had a second opportunity to address a flow-control regulation. There, the county solicited competitive bids for the collection and processing of all municipal solid waste in Bowling Green, Kentucky. 214 F.3d at 708. Under the agreement, the contractor would have the exclusive right to collect solid waste for five years. *Id.* The city would not directly pay the contractor; instead, all entities generating solid waste were

required to use the contractor, and the contractor would collect its payment from these customers. The contractor was required to operate the city's transfer station and process all of the solid waste collected at the transfer station. *Id.* at 708-09. Finally, the contractor was required to dispose of all waste at a landfill approved and permitted by the state, "effectively prohibiting the use of out-of-state disposal sites." *Id.* at 709. After selecting the contractor, the county passed an ordinance that executed the agreement. *Id.*

This Court found the ordinance to be unconstitutional. With respect to the requirement that the contractor process all of the solid waste at the transfer station, the Court rejected the defendant's market participation argument. The defendant argued that because it was a market participant in that it was procuring waste collection services for one of its cities, it was exempt from the strictures of the dormant Commerce Clause, and could thus force the contractor to use a single transfer station. *Id.* at 715. This Court disagreed and ruled that the county was neither purchasing nor selling products or services. Instead, it was forcing all of the inhabitants of a city to purchase services from a contractor, a power that "far exceeded that which a private entity could accomplish on the free market." *Id.* at 716. Disposing of the defendant's market participation argument, the Court then ruled that the ordinance was the "functional equivalent" as the one in *Carbone,* in that it required processing services at the city's transfer station and "nowhere else." *Id.* The ordinance thus discriminated against interstate commerce; the Court further found that the ordinance did not fall into the narrow exception based on local interests. *Id.*

With respect to the requirement that the contractor dispose of the solid waste at an in-state site, the Court found that *Carbone* was equally applicable; the ordinance "violated the Commerce Clause by prohibiting out-of-state disposal." *Id.* at 716. Interestingly, the Court stated in dicta that even if the

defendant were a market participant with respect to the collection or processing of waste, it could not regulate the downstream market of waste disposal.FN3 *Id.*

FN3. We agree that the defendant could not *regulate* the waste disposal market if it were only a market participant in the waste collection or processing markets; however, it could make a decision as a market participant that would duplicate the results of regulation. For example, if the defendant operated the transfer station as a market participant, it could choose where it ultimately disposed of the waste, such as an in-state disposal site.

Lastly, the Court readdressed the defendant's market participation argument. The Court found that had the defendant actually purchased the contractor's services with its own funds, it could have avoided scrutiny under the dormant Commerce Clause. *Id.* at 717. But by deciding to regulate the market, by forcing city residents to purchase the contractor's services, instead of participating in the market, the defendant "opened itself up" to such scrutiny. *Id.* Moreover, the fact that the defendant could have acted as a market participant to achieve the same ends did not save its ultimate decision to regulate the market in violation of the dormant Commerce Clause. *Id.* (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98-99, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) (plurality opinion)).

b. Application to This Case

The three cases cited above leave little doubt that the Ordinance in this case discriminates against interstate commerce. By forcing Plaintiff's members to use Defendant's disposal and transfer facilities, the Ordinance would prohibit these members from using other in-state and out-of-state facilities. The Ordinance is thus facially discriminatory against out-of-state interests.FN4

FN4. Defendant does not argue that it has no other means to advance a local interest; it only argues that the Ordinance is nondiscriminatory.

In response, Defendant makes a strange argument: "[Defendant] contends that its Ordinance affects both in-state and out-of-state entities the same. All haulers of solid waste that is generated in Daviess County must deposit waste in Daviess County's publicly owned landfill." (Def.'s Br. 15.) As Plaintiff points out, there is a difference between the market for waste collection and for waste disposal. We agree that the Ordinance does not discriminate against out-of-state waste collectors; however, that is not the point. The Ordinance discriminates against out-of-state waste disposal facilities, and this is dispositive with respect to this issue.

Defendant's argument that the Ordinance does not create a "bottleneck" also lacks merit. Defendant attempts to distinguish *Carbone* in that *Carbone* involved a waste transfer station, and the Ordinance here involves a waste disposal facility. Defendant's contention is that "[w]hen solid waste is delivered to a landfill for disposal, it is no longer in the stream of commerce." (Def.'s Br. 17.) This argument fails for two reasons. First, this Court has already held that *Carbone* applies to waste disposal facilities. *See* *Waste Mgmt.*, 130 F.3d at 736; *Huish Detergents*, 214 F.3d at 716. Second, *Carbone* is as applicable to disposal facilities as it is to transfer stations because "what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Carbone*, 511 U.S. at 390-91, 114 S.Ct. 1677. In other words, the focus is not on the actual waste and its location in the steam of commerce; the focus is on the attendant services and whether the Ordinance constricts the open channels of commerce to these services. Here, the Ordinance does exactly that: by

requiring disposal at Defendant's facility, out-of-state disposal service providers are shut out of the disposal market for waste generated in Daviess County.

Defendant's citations to purportedly analogous case law are likewise unconvincing and merit only a brief response. Defendant cites to *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.* for the proposition that the Ordinance is facially neutral. In that case, Ohio law authorized the county waste management board to make "facility designations." 249 F.3d 544, 547 (6th Cir.2001). This authorization "allow[ed] the board to 'designate solid waste disposal, transfer, or resource recovery facilities ... where solid wastes generated within or transported into the district shall be taken for disposal.' " *Id.* (quoting Ohio Rev.Code Ann. § 343.014(A)). Van Wert County then adopted a resolution whereby it solicited bids from in-state and out-of-state waste facilities to become "designated" facilities. *Id.*

This Court upheld the resolution because it was not "territorially based," as the bidding process was equally open to in-state and out-of-state waste facilities. *Id.* at 551. The Ordinance in this case does not open the waste disposal market equally to in-state and out-of-state interests; it closes the market to all except Defendant's waste disposal facility. Thus, there is not even a remote analogy to be drawn between *Maharg* and the instant case.

Eastern Kentucky Res. v. Fiscal Court of Magoffin County is also inapposite. There, this Court upheld Kentucky statutes that required local governments to create solid waste management plans for municipal solid waste and to identify any additional capacity for "out-of-area" solid waste. 127 F.3d 532, 541 (6th Cir.1997) (quoting Ky.Rev.Stat. Ann. § 224.43-345(1)(*l*)). The Court found that although the statute distinguished between in-area and out-of-area waste, the statute did not provide for different treatment between the two

categories. *Id.* In this case, there is an absolute difference in treatment; the Ordinance completely disallows out-of-state waste disposal services.

Finally, Defendant relies on the district court case of *Nat'l Solid Wastes Mgmt. Assoc. v. Granholm*. There, the plaintiff contested the legality of a set of Michigan statutes that created disposal requirements for Michigan landfills. 344 F.Supp.2d 559, 563-64 (E.D.Mich.2004). Under the statutes, solid waste generated in Michigan automatically qualified for disposal in Michigan landfills, whereas solid waste generated in other states did not automatically qualify, but instead required additional procedures. *Id.* The district court found that the statutes "contain no overt distinctions between in-state and out-of-state waste, nor do they expressly bar the entry of out-of-state waste into Michigan;" as a result, the statutes were facially neutral. *Id.* at 566. The Ordinance in this case, on the other hand, expressly bars out-of-state waste disposal providers from the Daviess County waste disposal market.

C. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT DEFENDANT DID NOT ELIMINATE THE DISPOSAL MARKET FOR SOLID WASTE

1. Standard of Review

The standard of review for the district court's grant of summary judgment is set out above.

2. Analysis

a. Legal Framework

Defendant's argument with respect to this issue centers entirely around the Second Circuit case of *USA Recycling, Inc. v. Town of Babylon.* In that case, the town built an incinerator as a waste disposal facility. 66 F.3d 1272, 1277 (2d Cir.1995).

The town raised funds via local bonds and hired a private contractor to build the incinerator. *Id.* The private contractor then leased the incinerator from the town, and the town paid the private contractor to operate the facility. *Id.*

Originally, the town passed a flow control ordinance that required all solid waste collected from the town to be disposed of at the town incinerator. *Id.* at 1278. In the wake of *Carbone,* the constitutionality of that practice was in great doubt. *Id.* In response, the town decided to purchase commercial waste collection services from one provider by utilizing a competitive bidding procedure open to in-state and out-of-state waste collection service providers. *Id.* at 1278-79. The key fact is that the town paid for the waste collection services itself; it did not force its commercial residents to purchase the services from the winning bidder. *Id.* The town passed on the cost by assessing an "annual benefit assessment" against each benefitted commercial parcel. *Id.*

In conjunction with this new policy for waste collection, the town also allowed the waste collector to dispose of 96,000 tons of solid waste per year at the incinerator for no charge. *Id.* If the waste collector disposed of more than this amount at the incinerator, the waste collector would be forced to pay the market rate at the incinerator for waste beyond this amount. *Id.* The contract also had a provision that gave the town the right to direct the waste collector to the disposal site of its own choice, but then the town would have to pay the disposal fee. *Id.*

The plaintiffs filed suit against the town, challenging both the waste collection and the waste disposal provisions of the contract. *Id.*

With respect to the waste collection aspect of the contract, the Second Circuit found that the town acted both as a market participant as it purchased waste collection services, and as a

market regulator, as it prevented any other entity from providing waste collection services other than the single contractor selected. *Id.* at 1282. Because the town effectively entered into regulation of the waste collection market, the court undertook the dormant Commerce Clause analysis.

The court found that the contract did not discriminate against interstate commerce. It found that:

No one enjoys a monopoly position selling garbage collection services in Babylon's commercial garbage market, because the Town has eliminated the market entirely. Not even the Town itself remains as a *seller* in the market. Although the Town is now the lone *provider* of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive customer case.... In Babylon, local businesses do not buy services from anyone.... Although taxpayers in the District ultimately foot the bill for these garbage services-just as they foot the bill for street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments-the payment of taxes in return for municipal services is not comparable to a forced business transaction .... In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in *Carbone.*

Id. at 1283 (emphasis supplied). Instead of forcing its mmercial residents to purchase waste collection services from a single provider, the town eliminated the market in the sense that the commercial residents no longer purchased waste collection services, and waste collection service providers no longer sold these services to the commercial residents. The town paid for the service itself, and then passed the cost on to its commercial residents.

With respect to the waste disposal aspect of the contract, the court found that the town could legally offer free disposal services to its selected waste collection provider, because it was a market participant. The town owned the incinerator; moreover, it paid a private contractor to operate the incinerator; in essence, the town had "exclusive rights to dispose of waste [at the incinerator]." *Id.* at 1288-89. As the court viewed the situation,

[t]he Town may exercise [its waste disposal] rights as it sees fit. It could sell those rights on the open market.... Instead, the Town has chosen to give away those rights for free, to dispose of garbage generated by town businesses. Babylon's decision ... therefore constitutes municipal participation in the waste disposal market.

Id. at 1289.

b. Application to This Case

[12] *Babylon* is in diametric opposition to the facts presented in this case. Defendant claims that, like the contract in Babylon, the Ordinance would merely "eliminate[ ] the market for solid waste disposal." (Def.'s Br. 24.) Despite Defendant's contention otherwise, the market for solid waste disposal would continue to exist in Daviess County under the Ordinance, and Defendant would have a monopoly on that market. Here, Defendant would be forcing waste collectors to purchase its waste disposal services; Defendant would remain as the lone seller in this market as a result of its regulation. A market is where a seller sells goods or services, and a buyer buys goods or services. In *Babylon*, the contract between the town and the private contractor eliminated the waste collection market because the waste collectors no longer sold their services to commercial residents, and commercial residents no longer purchased these services from the waste collectors. Instead,

the town purchased these services and provided them for the benefit of its commercial residents, just as with countless other government benefits.

In this case, waste collectors would be purchasing waste disposal services from Defendant under the Ordinance, and Defendant would be selling waste disposal services to waste collectors. Thus, the proposition that the Ordinance would eliminate the market is absurd. The Ordinance would not eliminate the market; instead, it would make Defendant the only player in the market.

The waste disposal analogue to the waste collection system in *Babylon* would be if Defendant's waste disposal facility charged nothing for the disposal of waste generated within Daviess County, and then passed this cost on to its residents via taxes. If this were the case, then there would be no sale or purchase of waste disposal services, and thus there would be no market. If this were the case, then the system would not discriminate against interstate commerce. Unfortunately, this is not the system that would be implemented by the Ordinance.FN5

FN5. Defendant seems to place weight in the fact that it "purchased" the Daviess County landfill in that it invested public funds in its construction. Defendant then attempts to analogize this purchase to the purchase of disposal services made by the town in *Babylon*. This Court agrees that Defendant is a market participant in the sense that it operates the County landfill; however, this is irrelevant. The operation of the landfill is not the concern; the concern is the regulatory behavior as prescribed in the Ordinance that requires waste collectors to purchase the landfill's services. Unlike the town of Babylon, Defendant would not be acting only as a market participant; it would also be regulating the waste disposal market to benefit its participation.

Defendant relies on *Harvey & Harvey Inc. v. County of Chester* and *Houlton Citizens' Coalition v. Town of Houlton* for the proposition that a municipality could eliminate the market for waste services. Both cases are examples where the court endorsed the principle that a municipality's selection of a waste service provider (be it collection or disposal) does not run afoul of the dormant Commerce Clause if the selection process was open to in-state and out-of-state contractors, a process that was obviously different from the unilateral selection of Defendant's landfill as the sole waste disposal provider in this case. Harvey & Harvey, 68 F.3d 788, 802 (3d Cir.1995) (waste disposal); Houlton, 175 F.3d 178, 188 (1st Cir.1999) (waste collection and processing). Furthermore, neither of these cases turned on the elimination of a market: *Harvey & Harvey* is a case where the municipality designated waste disposal sites; it did not purchase waste disposal services on behalf of its citizens, so no market elimination occurred. 68 F.3d at 794-95. *Houlton* is a case where the municipality did purchase waste collection and processing services on behalf of its citizens; however, the First Circuit explicitly decided not to base its decision on the market elimination analysis of *Babylon*; instead, the court found that because the selection process for a waste collector and processor was competitive and open to out-of-state businesses, the measure was valid under the Commerce Clause. 175 F.3d at 187-89. These two cases do not support Defendant's position that the Ordinance would merely eliminate the waste disposal market in Daviess County.

D. THIS COURT DECLINES TO ADOPT THE SECOND CIRCUIT'S PUBLIC-PRIVATE OWNERSHIP DISTINCTION WITH RESPECT TO THE DORMANT COMMERCE CLAUSE

1. Standard of Review

The standard of review for the district court's grant of summary judgment is set out above.

2. Analysis

a. Legal Framework

In *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority,* the Second Circuit examined the constitutionality of a county ordinance that required waste collectors to dispose of solid waste at approved processing sites designated by the county. 261 F.3d 245, 249-50 (2d Cir.2001). The county owned all of the designated processing sites. *Id.* at 250.

In a surprising decision, the Second Circuit found that the ordinance did not discriminate against interstate commerce. The court drew a distinction between private ownership and public ownership: in a case where the regulation benefits a facility owned by the municipality, the regulation is nondiscriminatory. *Id.* at 263. The court based its decision first on the language of *Carbone.* The court noted that the facility in *Carbone* was privately owned. *Id.* at 259. The court also pointed to language that local governments " 'may not use their regulatory power to favor *local enterprise.*' " *Id.* at 258-59 (quoting *Carbone,* 511 U.S. at 394, 114 S.Ct. 1677) (emphasis in the original). Moreover, the court characterized the struggle between the majority, concurrence, and dissent in *Carbone* as one that wrestled with the question of "*whether* the favored facility was public or private." *Id.* at 259 (emphasis in the original). The concurrence and the dissent viewed the facility in *Carbone* as one that was publicly owned, so it was nondiscriminatory in that it discriminated equally against in-state and out-of-state facilities; the concurrence and the dissent then analyzed the regulation under the *Pike* balancing test. *Id.* (citing *Carbone,* 511 U.S. at 402-03, 114

S.Ct. 1677 (O'Connor, J., concurring); 511 U.S. at 410-30, 114 S.Ct. 1677 (Souter, J., dissenting)).

The court then examined the language of other dormant Commerce Clause cases, and it found that those cases were primarily concerned with the protection of local businesses at the expense of out-of-state businesses. *Id.* at 260-61.

The court found that, from a policy perspective, a local regulation that favored a local municipality, as opposed to local businesses, was less likely to be protectionist, and was less likely to engender negative reaction from neighboring areas. *Id.* at 261.

Having found that the ordinance did not discriminate against interstate commerce, the court remanded the case to the district court to conduct the *Pike* balancing. *Id.* at 263-64.

b. Application to This Case

This Court has already found dormant Commerce Clause violations in cases where the facility was publicly owned. *See Waste Mgmt.*, 130 F.3d at 736; *Huish Detergents*, 214 F.3d at 716. Those cases did not directly address the public-private ownership issue raised by *United Haulers;* however, an adoption by this Court of the public-private ownership distinction, as suggested by Defendant and *amici,* would amount to the overturning of our prior decisions, as a necessary implication of those decisions was that public ownership did not change the dormant Commerce Clause inquiry. This Court does not have the ability to take such action. *See LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 n. 2 (6th Cir.1995) ("It is well-settled law of this Circuit that a panel of this Court cannot overrule the decision of another panel." (internal quotations and citation omitted)).

Moreover, this Court respectfully disagrees with the Second

Circuit on the proposition that *Carbone* lends support for the public-private distinction drawn by that court. For every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition. For example, the Court focused on the fact that "the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives *out-of-state businesses of access to a local market.*" *Carbone*, 511 U.S. at 390, 114 S.Ct. 1677 (emphasis supplied). There, the focus of the court was on the harm to out-of-state businesses***911** and the local market, as opposed to the benefit conferred to the local provider. Importantly, this harm would occur regardless of who owned the benefitted facility. In further support that the focus of the dormant Commerce Clause inquiry was on the economic harm to out-of-state actors and the local market, the Court stated, "The *essential vice* in laws of this sort is that they bar the import of the processing service." *Id.* at 392, 114 S.Ct. 1677 (emphasis supplied). In other words, the crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefitted by the ordinance is publicly owned.

Even in the language of the *United Haulers* decision itself, the court recognized this focus on the effects on foreign businesses by isolating the local market:

Our system, fostered by the Commerce Clause, is that every farmer and craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

United Haulers, 261 F.3d at 254 (quoting *H.P. Hood & Sons*, 336 U.S. at 539, 69 S.Ct. 657). Free access for out-of-state businesses to the local market is "the rationale underlying the judicially created dormant Commerce Clause." *Id.*

In our view, the Second Circuit placed too much importance on phrases like "rival businesses" and "local enterprise" as used by the *Carbone* Court. *See id.* at 258-59. A municipality can be considered a local business in competition with out-of-state businesses, and a municipality can participate in local enterprise. While the Supreme Court expressed concerns of aiding local enterprise at the expense of rival businesses, these concerns remain regardless of whether the municipality owns the favored business.FN6

FN6. The Second Circuit also placed stock in the Supreme Court's use of the phrase "single local proprietor" in *Carbone* to support its public-private ownership distinction. *Id.* at 258. We fail to see the logical connection; a proprietor is defined simply as "[a]n owner, esp. one who runs a business." Black's Law Dictionary 1236 (7th ed.1999). There is absolutely no denotation that a proprietor can only be a private entity. Moreover, when the Supreme Court spoke of the "single local proprietor," its focus was on the harm to out-of-state competition:

The only conceivable distinction from [the cited dormant Commerce Clause cases] is that the flow control ordinance favors a single local provider. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk,* the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pastuerizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Carbone, 511 U.S. at 392, 114 S.Ct. 1677. The Supreme Court's concern about squelching competition altogether, leaving no room for outside investment, exists in the present case under the Ordinance; the fact that Defendant would be

the single local proprietor does not in any way mitigate this explicit harm.

This fact is implicit in the *Carbone* decision. We disagree with the Second Circuit that the point of contention in *Carbone* between the majority on the one hand, and the concurrence and the dissent on the other, was *whether* the waste transfer facility was public or private. Both the concurrence and the dissent agreed that because the waste transfer facility was publicly owned, it treated all other businesses, in-state and out-of-state, equally. *See supra.* The analysis of four Justices thus turned on the public-private distinction relied on by the Second Circuit; ***912** however, the majority's decision was not based on the categorization of the waste transfer facility as a private business.FN7

FN7. The Second Circuit considered it unclear whether the *Carbone* majority "either rejected or accepted the public/private distinction." *United Haulers,* 261 F.3d at 260. But not even the *Carbone* dissent was willing to adopt this view, though it had every incentive to do so. Had the dissent thought it plausible to read the majority's reasoning as consistent with the public-private distinction, it never would have characterized the majority as rejecting the distinction outright. *See Carbone,* 511 U.S. at 420, 114 S.Ct. 1677 (Souter, J., dissenting) ("The majority ignores this distinction between public and private enterprise."). The dissent thought that the public nature of the favored transfer facility rendered the ordinance to be non-discriminatory; it thus considered the public-private distinction of constitutional import. It makes no sense to suggest that the dissent, rather than characterizing the majority's holding narrowly, as concerning only private entities, would have broadened the majority's holding to reject a distinction that it itself advocated.

From the facts of *Carbone,* the waste transfer facility was

quite clearly owned in fact by the municipality. Though possessed and operated by the private contractor who built the facility for the first five years of operation, the entire arrangement between the county and the private contractor dealt only with the form of payment to the private contractor for building the transfer station for the town; there was no real doubt as to who actually owned the facility. Contrary to the declaration of the Second Circuit, the Supreme Court did not "repeatedly reference[ ] the private nature of the favored facility," *id.* at 258; in fact, the Court stated, "The object of this arrangement was to amortize the cost of the transfer station: The town would finance *its* new facility with the income generated by the tipping fees." *Carbone*, 511 U.S. at 387, 114 S.Ct. 1677 (emphasis supplied). At most, the private contractor was an agent of the town, collecting tipping fees on behalf of the town and then applying these fees to the construction costs that were not directly charged to the town because of the agreement.

Other language denoted an understanding by the majority that the facility was publicly owned: the Court's characterization of the "town-sponsored facility," the fact that "the flow control ordinance is a financing measure," the reference to the facility as "its [*i.e.*, the town's] project." *Id.* at 393-94. The majority did not find that the ordinance discriminated against interstate commerce because the waste transfer facility was privately owned, and we find that the Supreme Court implicitly rejected the public-private distinction.

The Second Circuit's interpretation of other dormant Commerce Clause cases was similarly strained. We assume the truth of the statement that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence ... is that a local law discriminates against interstate commerce when it hoards local resources in a manner that favors local business, industry or investment over out-of-state competition." *United Haulers*, 261 F.3d at 261. But again, Daviess County is act-

ing as a local business in the local industry of waste disposal. Not to belabor the point, but under the Ordinance, Defendant would be acting in a dual role: as a local business selling waste disposal services, and as a local government hoarding "waste, and the demand to get rid of it, for the benefit" of this business. *Carbone*, 511 U.S. at 392, 114 S.Ct. 1677. The fact that Defendant acts as both a business and a government, as opposed to just a government, does not cloak its facially protectionist activity from the appropriate scrutiny under the Commerce Clause.

***913 III. CONCLUSION**

For the foregoing reasons, we **AFFIRM** the district court's order.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-6498

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Plaintiff – Appellee,

v.

DAVIESS COUNTY, KENTUCKY,
Defendant – Appellant.

Before: CLAY AND COOK, Circuit Judges; COOK, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Owensboro.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ **Leonard Green**
Leonard Green, Clerk

No. 04-6498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Plaintiff – Appellee,

v.

O R D E R

DAVIESS COUNTY, KENTUCKY,

Defendant – Appellant.

Before: CLAY AND COOK, Circuit Judges; COOK, District Judge*

This matter comes before the court upon the petition of appellant Daviess County for rehearing of the decision of January 24, 2006, affirming the judgment of the district court. Upon consideration the petition is hereby denied.

ENTERED BY ORDER OF THE COURT
s/ **Leonard Green**
Leonard Green, Clerk

[1] The Honorable Julian Abele Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

United States Court of Appeals,Sixth Circuit.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, Plaintiff-Appellee
v.
DAVIESS COUNTY, KENTUCKY, Defendant-Appellant.
No. 04-6498

March 30, 2006.

Before: CLAY and COOK, Circuit Judges; COOK, District Judge FN*.

FN* The Honorable Julian Abele Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

CLAY, Circuit Judge, concurring in the denial of the petition for rehearing.

This matter comes before the court upon the petition of appellant Daviess County for rehearing of the decision of January 24, 2006, affirming the judgment of the district court. Upon consideration the petition is hereby denied.

The unanimous opinion in this case makes unmistakably clear that Plaintiff established prudential standing under the Commerce Clause by alleging that the Ordinance would impair the right of its members to contract with out-of-state waste disposal providers. There simply is no ambiguity, misstatement, or oversight in this aspect of the opinion that would warrant the grant of the petition for rehearing.

The dissent to the denial of the petition for rehearing seems to believe that the Court should have expanded its analysis under prudential standing by examining whether out-of-state waste disposal providers charged lower prices, so as to establish downward price pressure on the in-state waste disposal market.

In taking up such a position, the dissent conflates the separate and distinct inquiries under constitutional and prudential standing. While its exact position is somewhat unclear, the dissent seems to assert that the "zone of interest" protected by the dormant Commerce Clause includes a party's ability to contract with out-of-state parties, but only when such contracting would lead to downward price pressure in the state. As the panel opinion amply demonstrates, this position is incorrect. The Commerce Clause prevents a state from erecting barriers to access to that state's markets, regardless of price pressure:

> Our system, fostered by the Commerce Clause, is that every farmer and craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949). Nothing in the Constitution or Supreme Court jurisprudence remotely lends support to the notion that state regulation of commerce is impermissible, except when competition with other states would not lead to lower in-state prices. The focus is on discrimination against or burdens upon out-of-state goods or services: "We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). *See also Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir.1997) ("The chief purpose underlying that Clause is to limit the power of the States to erect barriers against interstate trade." (internal quotation

marks and citation omitted).) The zone of interest of the dormant Commerce Clause is the prevention of state regulation of commerce, and this includes a state regulation that disallows an in-state party from contracting with out-of-state parties.

Indeed, in *Huish Detergents*, this Court, in its discussion of prudential standing, focused on the right to contract with out-of-state parties in general, not the right to contract with out-of-state parties that offer lower prices:

> Huish argues that it meets this [prudential] standing requirement because it has pleaded an injury that falls within the zone of interests protected by the Commerce Clause, and we agree. Huish seeks to protect its right to contract with a company that can transport its waste for out-of-state processing and/or disposal. In making this claim, Huish is asserting its individual right as a consumer to purchase waste processing and disposal services across State boundaries, an interest that falls squarely within the zone of interests protected by the Commerce Clause. The Clause protects not only producers, but also consumers like Huish who may look to the free competition from every producing area in the Nation to protect [it] from exploitation by any.

Huish Detergents, Inc. v. Warren County, 214 F.3d 707, 710 (6th Cir.2000) (second alteration in the original) (quotation marks and citation omitted). Not a single time did this Court mention "lower prices" or "price pressure" in discussing prudential standing, and for good reason; these concepts are relevant to constitutional standing, *i.e.*, whether a party suffers from an injury in fact, but they are irrelevant to prudential standing. Quite appropriately, the *Huish* panel discussed

lower prices in its analysis on constitutional standing and the ability to contract with out-of-state providers in its analysis of prudential standing, a structure that is echoed in the opinion in the instant case.

Of course, the Court must look at the same injury when determining whether a party has constitutional and prudential standing. For example, this Court could not assert jurisdiction over a claim where a party bases its constitutional standing on Injury 1 but its prudential standing on Injury 2. FN1 The point is that when the Court examines a party's injury, the Court looks to *different facets* of that injury in analyzing constitutional and prudential standing. In this case, Plaintiff claims that its members who collect waste within Daviess County would be disallowed by the Ordinance from contracting with lower price out-of-state waste disposal providers. The fact that these members are forced to pay higher prices demonstrates constitutional standing, while the fact that the regulation prevents contracting with out-of-state parties demonstrates prudential standing under the Commerce Clause. The dissent's assertion that the prudential standing analysis somehow envelopes the injury in fact requirement of constitutional standing plainly misses the mark.

FN1. Thus, under the analysis of the panel opinion, standing would *not* be conferred under the hypothetical, posited by the dissent, of a similar ordinance in a county in the middle of Texas. There, constitutional and prudential standing derive from different sources: constitutional standing is based on the inability to contract with lower price in-state but out-of-county waste disposal providers, whereas prudential standing is based on the inability to contract with out-of-state waste disposal providers. These are not different facets of the same injury but different injuries altogether.

Here, Plaintiff alleges the same underlying injury for both constitutional standing and prudential standing: the inability to contract with lower price out-of-state waste disposal providers. The dissent's belief that the panel opinion's analysis would find constitutional and prudential standing under the hypothetical is a misapprehension.

COOK, Circuit Judge, dissenting from the denial of rehearing. I respectfully dissent from the panel's decision to deny rehearing in this case. The Petition for Rehearing presented the first briefing to this panel on the issue of prudential standing. Prompted by that petition, I believe that we should "amend or supplement the original opinion to eliminate an ambiguity or correct a misstatement." Sixth Circuit Federal Practice Manual 141 (2d ed.1999).

Under the "zone of interests" prudential standing requirement, "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). That *same* grievance-or, as it is described later in *Bennett*, "the injury [the plaintiff] complains of," *Id.* at 176, 117 S.Ct. 1154 (citation and quotation marks removed)-provides the basis for Article III standing, and must satisfy the minimum standards of injury in fact, traceability, and redressibility. *Id.* at 167, 117 S.Ct. 1154 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). An "injury in fact [is] an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.*

I would amend the opinion to clarify that the injury in this case that falls within the dormant Commerce Clause's

"zone of interests" is not the mere impediment of "[NSWMA's] right to contract with an out-of-state waste disposal provider," as the panel suggests. *Opinion*, p. 649. Stated as such, the injury would not satisfy the *Article III* requirements that a plaintiff's injury be "concrete and particularized," "actual or imminent," and "not conjectural or hypothetical." *Bennett*, 520 U.S. at 167, 117 S.Ct. 1154. NSWMA has not alleged that any of its members have actually contracted with out-of-state disposal providers. The impediment of the ability of NSWMA's members to do so in the future *per se* is too attenuated to meet the constitutional standard.

We should explain instead that NSWMA has articulated a sufficiently immediate interest to satisfy both the prudential and constitutional requirements by alleging that competition between in-state and out-of-state waste disposal providers confers a *current* benefit (in the form of downward price pressure) on in-state waste collectors, particularly those that operate in a border county like Daviess. In *Huish Detergents Inc. v. Warren County*, we recognized the Constitutional value of that benefit, holding that the Commerce Clause protects the right of "consumers ... '[to] look to the free competition from every producing area in the Nation to protect [it] from exploitation by any.' " 214 F.3d 707, 711 (6th Cir.2000) (quoting *Dennis v. Higgins*, 498 U.S. 439, 450, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991)). Here, NSWMA alleged that the Ordinance prevents NSWMA waste collectors who collect waste within Daviess County-including Republic, which does both waste collection and disposal-from accessing the services offered by out-of-state waste disposal providers. The option of "look[ing] to" such out-of-state providers (on which the opinion focuses) is only constitutionally relevant because such out-of-state providers compete in what would be a

multi-state market but for the Ordinance.FN1 Because the Ordinance grants the Daviess County Landfill and Transfer Station a monopoly in that multi-state market, it creates a grievance that is sufficiently actual and immediate to satisfy both the prudential and constitutional requirements for standing.

FN1. The concurrence contends that we need only look to "*different facets* " of NSWMA's injuries. I take its point to be that if we describe NSWMA's injury simply as the inability to dump outside of Daviess County, then the injury-in-fact requirement would be met by the loss of cheaper in-state options, and the zone-of-interests requirement would be met by the loss of the opportunity to contract with out-of-state providers-regardless of whether that lost opportunity contributed to the plaintiff's injury-in-fact. Such a theory would require us to uphold standing in a case where a similar ordinance were imposed on a county in the very middle of Texas, even if the waste collectors there would never consider transporting the county's trash out-of-state (and thus only in-state disposal service providers would compete for the county's trash). I think it would be imprudent to uphold standing in that case, because I cannot see how such collectors would be injured by the inability to dump out-of-state. I do not see what stake such collectors would have in the court's determination of whether the ordinance impermissibly restricted interstate commerce, and thus I cannot see how they would be proper parties to pursue a claim that it did.

I concur with the opinion in all other respects.

(4)

No. 06-359

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SUPREME COURT, U.S.

In the Supreme Court of the United States

DAVIESS COUNTY, KENTUCKY,
Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN RESPONSE

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

This Court definitively ruled in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), that local ordinances directing solid waste to a preferred processing facility - known as flow control ordinances - are facially discriminatory against interstate commerce and are thus *per se* violations of the dormant Commerce Clause. In light of that clear, unambiguous holding, the Sixth Circuit Court of Appeals struck down an ordnance enacted by Daviess County which directed all municipal solid waste generated within its borders to its own transfer station and landfill. This case presents one question, which is already the subject of a Petition for Certiorari granted during this term:

Whether the *per se* rule announced in *Carbone* applies when the preferred processing facility is publicly owned.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent National Solid Wastes Management Association is an unincorporated association and has no stock. It is a subsidiary of the Environmental Industry Associations, a non-profit corporation incorporated in Illinois with its principal place of business in Washington, D.C. Therefore, no parent or publicly-held company holds 10% or more of National Solid Waste Management Association's stock.

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BRIEF IN RESPONSE

SUMMARY OF REASONS TO HOLD THE PETITION

This Court recently granted a Petition for a Writ of Certiorari to the Second Circuit Court of Appeals in the case of *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, docket number 05-1345. The *United Haulers* case presents the same question for review as this case—whether this Court's well-reasoned opinion in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), in which this Court determined that restrictions on the flow of waste in interstate commerce through the use of "flow control" laws and ordinances facially discriminate against interstate commerce and are thus *per se* unconstitutional under the dormant Commerce Clause, applies with equal force to publicly-owned facilities. The Second Circuit invented an exception from *Carbone* for beneficiaries of flow control laws and ordinances which are publicly owned, a distinction called "surprising" and rejected by the Sixth Circuit in this case. Because this Court has already accepted the question presented for review this term, and the Sixth Circuit's opinion is consistent with *Carbone*, this Court should hold Daviess County's petition pending its resolution of *United Haulers*.

STATEMENT OF THE CASE

A. The Ordinance at Issue.

The Daviess County Fiscal Court enacted the Ordinance at issue in this case on February 19, 2004:

> 1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its

> jurisdiction through the grant of nonexclusive franchises.
>
> 2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.
>
> 3. Nonexclusive franchises shall be granted to all haulers that are properly registered in accordance with [Ky. Rev. Stat. §] 224.43-315(2), have properly filed an annual report as required by [Ky. Rev. Stat. §] 224.43-315, and are in compliance with all other applicable laws and regulations.
>
> 4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted a franchise by Daviess County Fiscal Court.

Pet. App. 2a-3a. The Ordinance requires all registered haulers of waste in Daviess County to dispose of all municipal solid waste collected within the County at the County-owned landfill or transfer station. *Id.* Fiscal Court first obtained a permit for its county-owned landfill in 1994. It is the only permitted landfill within the borders of Daviess County. Pet. at 5.

B. Rationales Asserted in Support of the Ordinance.

Daviess County has consistently asserted two rationales in support of the Ordinance throughout this case: (1) its authority under Ky. Rev. Stat. § 224.43-315; and (2) its desire to ensure that the cost of disposal of solid waste in Daviess County remains low. Pet. at 5-6; Pet. Supp. App.

18a-19a. Ky. Rev. Stat. § 224.43-315, the first rationale, requires all Kentucky counties to provide a universal collection system for all municipal solid waste generated within the county, Ky. Rev. Stat. § 224.43-315(1), and requires haulers of municipal solid waste to register with counties and submit annual reports detailing solid waste collection activities to both the counties in which they are registered and the Kentucky Environmental and Public Protection Cabinet. Ky. Rev. Stat. § 224.43-315(2)-(4).[1] Notably, Ky. Rev. Stat. § 224.43-315 does not require a county to provide collection or disposal services itself. A county may fulfill its obligations under Ky. Rev. Stat. § 224.43-315(1) by entering into contracts or franchises with private companies. The second rationale, a so-called desire to keep disposal costs low – ironically by eliminating competition – is not related to any of Daviess County's legal duties. Rather, it is pure economic protectionism for Daviess County's landfill and transfer station. The Ordinance allegedly keeps disposal costs low by guaranteeing a flow of solid waste into the facility—a goal achieved through the sheer exercise of Daviess County's regulatory power.

In addition to explicitly invoking Ky. Rev. Stat. § 224.43-315 in the text of the Ordinance and asserting its interests in economic protectionism, Daviess County has also repeatedly invoked a number of other Kentucky statutes relating to counties' powers and duties to regulate solid waste. Pet. at 4-5. Though each of these statutes touches on both state and county waste management authority, each statute has distinct and separate aims. Neither support a need or state a policy determination by the General Assembly that Kentucky-

[1] NSWMA did not challenge the registration provision in Ky. Rev. Stat. § 224.43-315(2)-(4) or in the Ordinance.

generated waste should be disposed of in its county of origin, a publicly-owned facility, or even in a Kentucky landfill.

C. Effect of the Ordinance on NSWMA.

NSWMA is a non-profit trade association with its primary place of business in Washington, D.C. Pet. App. 3a. NSWMA has members in all fifty states, including Republic Services of Kentucky, LLC ("Republic"). Republic is engaged in the solid waste management business in Daviess County and has duly registered with the County pursuant to Ky. Rev. Stat. § 224.43-315 and the Ordinance.[2] *Id.*

D. Proceedings Below.

NSWMA filed its Complaint for declaratory and injunctive relief against Daviess County on March 25, 2004. Pet. App. 1a. NSWMA alleged that the Ordinance violated the dormant Commerce Clause, Art. I, § 8, cl. 3 of the U.S. Constitution, on its face because it restricted the flow of a commodity, municipal solid waste, in interstate commerce, in direct contravention of this Court's opinion in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). Ct. App. JA 7-11. Daviess County filed an Answer and Counterclaim seeking a judgment declaring that the Ordinance was constitutional under the dormant Commerce Clause, asserting *inter alia* that it should be afforded the exception from *Carbone* for publicly-owned facilities created by the Second Circuit Court of Appeals in *United Haulers*

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[2] Though the Ordinance speaks in terms of non-exclusive "franchises," this term is technically incorrect under Kentucky law since Ky. Const. § 164 subjects franchises to public advertisement and bidding. The registrations can be considered no more than licenses to do business in Daviess County.

Association v. Oneida-Herkimer Solid Waste Management Authority, 261 F.3d 245 (2d Cir. 2001). Ct. App. JA 16-28.

The parties filed simultaneous motions for summary judgment on their respective requests for declaratory, and in the case of NSWMA, injunctive, relief. Pet. App. 2a. The District Court entered a Memorandum Opinion and Order on November 19, 2004. *Id.* In its Opinion, the District Court held that the Ordinance discriminated against interstate commerce on its face and thus violated the dormant Commerce Clause. Pet. Supp. App. 18a. The District Court also declined to apply the exception from *Carbone* for publicly-owned facilities in *United Haulers*. Pet. Supp. App. 8a-12a. The District Court entered a judgment permanently enjoining enforcement of the Ordinance. Pet. Supp. App. 20a.

Daviess County appealed the judgment of the District Court to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the District Court in all respects, including its rejection of the Second Circuit's rationale in *United Haulers*. Pet. App. 20a-26a.

REASONS FOR HOLDING THE PETITION

I. The Court has already accepted the issues presented in this case for review.

This Court granted certiorari in the case of *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, docket number 05-1345, on September 26, 2006. The Sixth Circuit Court of Appeals' opinion in this case is in direct conflict with the Second Circuit's opinion in *United Haulers* over the proper interpretation of this Court's opinion in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383

(1994), as applied to flow control laws benefiting publicly-owned waste processing facilities. Given that this Court has already accepted the *United Haulers* case for review, and, as stated more fully below, the Sixth Circuit's opinion in this case sets forth the proper application of *Carbone* to the facts presented in these cases, it is not necessary for the Court to grant Daviess County's Petition for a Writ of Certiorari at this time. This Court should hold Daviess County's Petition pending resolution of the question presented in *United Haulers*.

II. The Sixth Circuit's decision was correct.

In holding that Daviess County's attempt to discriminate against interstate commerce through the use of a classic flow control ordinance was foreclosed by the dormant Commerce Clause, the Sixth Circuit Court of Appeals relied on this Court's opinion in *Carbone*. The Sixth Circuit's straightforward, common sense application of *Carbone* is undoubtedly correct and unassailable. In contrast, the Second Circuit undercut the clear rationale of *Carbone* when it invented the exception for publicly-owned facilities in *United Haulers*. There is therefore no reason to grant Daviess County's Petition, and this Court can hold its petition while it resolves the question presented in *United Haulers*.

This Court directly applied well-settled traditional dormant Commerce Clause analysis to so-called "flow control" laws in 1994 in *Carbone*. A flow control law is a restriction imposed by a state or subdivision of a state intended to direct its waste to a favored processing or disposal facility.[3] The

[3] *Amici* have requested to file a study analyzing a report by National Economic Research Associates concerning the economic effects of flow control. The very National Economic Research Associates

purpose of directing waste in this way is generally to generate revenue sufficient to retire debt associated with constructing a public facility or to create a sufficient flow of waste to otherwise ensure the economic viability of the disposal facility. *Id.* at 389 ("to ensure that the town-sponsored facility will be profitable"). Clarkstown instituted what it clearly thought was an ingenious scheme when, after closing its town dump, it arranged for a local contractor to build a transfer station. The contract providing for the construction allowed Clarkstown to purchase the facility after five years for one dollar. In order to ensure that this arrangement was economically feasible for the contractor, Clarkstown entered into an agreement with the contractor to provide for a minimum fee for disposal of waste at the transfer station, and enacted an ordinance requiring all waste generated within Clarkstown to be disposed of at the transfer facility. *Id.* at 387.

Carbone, a local recycler, argued that the flow control ordinance impaired its ability to compete in interstate commerce. This Court agreed and declared that the flow

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report cited throughout the study proffered by *Amici* demonstrates that flow control increases disposal costs. Regardless of any municipality's alleged "need" for flow control, all such entities must comply with the requirements of the dormant Commerce Clause. If flow control is necessary as a policy matter, Congress must make that determination and enact legislation authorizing it. To date, Congress has passed no law overruling the effect of *Carbone* and allowing local governments to burden interstate commerce in this manner, even though a number of such bills have been proposed. Brief of *Amici Curiae* American Trucking Associations, Inc. and National Solid Wastes Management Association in Support of the Petitioners at 4 and n.3, *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 05-1345 (certiorari granted September 26, 2006).

control ordinance discriminated against interstate commerce on its face, in violation of the dormant Commerce Clause:

> The real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce. For this inquiry, our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce, *Philadelphia*, 437 U.S., at 624; and second, whether the ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test.

Id. at 389-90. Since the flow control ordinance discriminated against interstate commerce on its face, there was no need to discuss whether there were any putative local benefits—the ordinance was *per se* unconstitutional.

Daviess County invited the courts below to ignore the holdings of this Court in *Carbone* and to adopt the unfounded exception to *Carbone* invented by the Second Circuit Court of Appeals in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001), for discriminatory restrictions on interstate commerce favoring publicly-owned facilities. The Sixth Circuit properly rejected this invitation, finding that *United Haulers* was inconsistent with the rationale underlying this Court's holding in *Carbone*.

United Haulers involves a challenge by a group of private haulers to a flow control regulation similar to that enacted by Daviess County. Two upstate New York counties created a

multi-county solid waste management authority and constructed six solid waste management facilities, including a transfer station and two landfills. Those counties then adopted flow control ordinances directing that all solid waste generated within the solid waste management authority be disposed of at one of the authority's six facilities. *United Haulers*, 261 F.3d at 249-51. The only factual difference between *United Haulers* and *Carbone* was the New York facilities at issue in *United Haulers* were already publicly owned, whereas the facility in *Carbone* was owned by a contractor, but with an agreement to allow the municipality purchase the facility after five years for a dollar.

The district court ruled the flow control laws constituted *per se* violations of the dormant Commerce Clause and enjoined enforcement of the scheme, *see id.*, but the Second Circuit reversed. The Second Circuit concluded that a flow control ordinance does not discriminate against interstate commerce, even under *Carbone*, when the ordinance favors a local interest that is publicly-owned, ostensibly carving out an exception for flow control ordinances aimed at publicly-owned facilities. *See id.* at 257-64. The Second Circuit then remanded the case to the district court for a determination of whether the ordinance violated the balancing test for restrictions which do not discriminate against interstate commerce on their face set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See id.* at 264. Both the district court and Second Circuit determined that the ordinance did not violate the *Pike* balancing test. This Court has now accepted certiorari on the question of whether the Second Circuit correctly applied *Carbone* to the challenged ordinance.

In reaching this holding, the Second Circuit dissected *Carbone* and determined – based almost exclusively on

language in the dissent, not the majority opinion – that the operative fact in *Carbone* was the fact that the flow control ordinance enacted by the Town of Clarkstown directed the town's waste to a privately-owned facility,[4] not solely that the facility in Clarkstown was local and was benefiting at the expense of other actors in interstate commerce. *See id.* at 257-60.

The District Court refused to adopt the *United Haulers* rationale in this case:

> The Court does not agree that the Carbone decision turned on whether the facility was public or private. The minority criticized the majority for ignoring the fact that no benefit was bestowed on local private actors as a result of the flow control ordinance. They pointed out to the majority that the ordinance simply aided the government in satisfying a traditional government responsibility. Instead of being divided over whether the facility was public or private, it seems it simply did not matter to the majority that they (sic) facility was public.
>
> The majority in Carbone focused instead on the effect of the flow control ordinance—that it hoarded solid waste, and the demand to get rid of it, for the benefit of the single local proprietor. The majority found that

[4] This analysis ignores the immense public stake in the waste disposal facility at issue in *Carbone*. That facility was built at the request of the municipality and the municipality had guaranteed a minimum flow of waste to the facility in order to ensure that the cost of constructing the facility was paid off within five years so that the town could purchase the facility for a dollar. Thus, the facility would have been publicly owned within a short period of time. *See Carbone*, 511 U.S. at 387, 412.

> such a restriction discriminated against the stream of commerce, as "it allows only the favored operator to process waste that is within the limits of the town." Id. at 391. Because the movement of the waste was curtailed, the ordinance was per se discriminatory. Id.

Pet. Supp. App. 9a-10a.

Likewise, the Sixth Circuit rejected *United Haulers*, calling it "surprising." Pet. App. 20a. The Sixth Circuit criticized the Second Circuit's reliance on language in the dissent drawing a distinction between public and private ownership, noting that "[f]or every sentence in the decision that can be interpreted as supporting such a distinction, there is a sentence that can be interpreted in opposition." Pet. App. 22a. The Sixth Circuit focused on the true purpose of the dormant Commerce Clause, as elucidated in *Carbone*:

> In further support that the focus of the dormant Commerce Clause inquiry was on the economic harm to out-of-state actors and the local market, the Court stated, "The essential vice in laws of this sort is that they bar the import of the processing service." [*Carbone*, 511 U.S.] at 392 (emphasis supplied). In other words, the crux of the inquiry is whether the local ordinance burdens interstate commerce, not whether the local entity benefited by the ordinance is publicly owned.

Pet. App. 22a. The Sixth Circuit went on to note that not even the dissent in *Carbone* accepted the public-private distinction, even though "it had every incentive to do so." Pet. App. 24a. The Sixth Circuit concluded by holding that the public ownership of its transfer station and landfill does

not "cloak [Daviess County's] facially protectionist activity from the appropriate scrutiny under the Commerce Clause." Pet. App. 26a.

The single unifying strand in the majority opinion in *Carbone* is the focus on the local nature of the favored interest, not its status as either privately- or publicly-owned. "Local" is not the same as "private." The Second Circuit missed the *Carbone* majority's point, which is the local nature of the favored facility, not whether it is privately-owned. As the Sixth Circuit noted, it makes no difference that Daviess County owns the transfer station and landfill benefiting from its flow control ordinance—the effect on the market is the same whether Daviess County owns the facility or not. It creates an unfair monopoly.

The well-reasoned decision of the Sixth Circuit Court of Appeals is in accord with this Court's decision in *Carbone*, and should not be disturbed. The Second Circuit's decision, on the other hand, is not supported by *Carbone* and can now be corrected by this Court. The Petition for a Writ of Certiorari should be held while this Court resolves the question presented in *United Haulers*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be held.

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NO. 05-

IN THE SUPREME COURT OF THE UNITED STATES

DAVIESS COUNTY, KENTUCKY
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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO.: 4:04CV-31M

NATIONAL SOLID WASTE MANAGEMENT PLAINTIFF ASSOCIATION

V.

DAVIESS COUNTY, KENTUCKY DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on cross-motions for summary judgment. The Plaintiff, National Solid Waste Management Association (hereinafter "NSWMA") and the Defendant, Daviess County, (hereinafter "County") have simultaneously briefed the Court on their respective positions concerning the constitutionality of Daviess County's Solid Waste Ordinance KC § 830.5 (2004) (hereinafter the "Ordinance"). [DN 15, 16].

The matter is now ripe for decision. For the reasons set forth below, the motion by Plaintiff NSWMA for summary judgment is **granted** and the motion by Defendant Daviess County for partial summary judgment is **denied**.

I. STANDARD

The summary judgment standard requires that the Court find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts of this case are largely undisputed, and as both parties have moved for summary judgment, the Court reviews the uncontested facts.

II. BACKGROUND

Plaintiff NSWMA is a representative trade association

for Republic Services of Kentucky, LLC ("Republic"). Republic is a solid waste management business that is duly registered and operates in Daviess County, Kentucky. The Defendant, Daviess County, has proposed a new solid waste flow ordinance that will affect the disposal of waste collected by Republic. The Ordinance provides in pertinent part:

> 1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its jurisdiction through the grant of nonexclusive franchises.
> 2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.
> 3. Non exclusive franchises shall be granted to all haulers that are properly registered in accordance with KRS 224.43-315, and are in compliance with all other applicable laws and regulations.
> 4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted a franchise by Daviess County Fiscal Court.
>
> Daviess County Ordinance § 830.5 (2004).

Republic currently disposes of waste at the County transfer station or in a Kentucky landfill owned by Republic. The proposed Ordinance requires all solid waste collected in the County to be disposed of at the Daviess County Landfill or

Transfer Station. Republic objects to the restriction since it will not be allowed to use its landfill. Further, Republic asserts that it may incur a future need to deposit solid waste outside of Kentucky. On behalf of Republic, NSWMA has challenged the constitutionality of the Ordinance.

Specifically, the question before the Court is whether the Ordinance violates the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution. In determining if a particular law violates the dormant Commerce Clause, a court must engage in a two-step inquiry. First, a court must determine whether the law "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." Oregon Waste Systems., Inc. v. Department of Envtl. Quality of Oregon, 511 U.S. 93, 99 (1994). Discrimination is defined as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. See also Waste Mgmt, Inc. v. Metropolitan Gov't, 130 F.2d 731, 735 (6th Cir. 1997). If a law discriminates against interstate commerce in favor of a

local business investment, it is virtually per se invalid, unless "the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 392 (1994) (citing Maine v. Taylor, 477 U.S. 131 (1986).

If the law is not discriminatory, the court must proceed to the second step. This second step is referred to as the Pike balancing test. [N]on discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' Oregon Waste Sys., 511 U.S. at 99 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In order for a challenged Ordinance to be valid, the Ordinance must not be facially discriminatory *and* it must survive the Pike balancing test. Eastern Kentucky Resources v. Fiscal Court of Magoffin Co., Ky, 127 F.3d 532, 540 (6th Cir. 1997). By agreement of the parties, the only issue before the Court is the first prong of the analysis. Thus, this opinion

will only examine whether the Ordinance is facially discriminatory against interstate commerce.

III. ANALYSIS

The Commerce Clause provides that "Congress shall have Power...[t]o regulate Commerce...among the several States." U.S. CONST. art. I, § 8, cl. 3. Judicial precedent has wrung a negative implication from the text more commonly known as the "dormant" Commerce Clause. See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987). The dormant clause prohibits economic protectionism within the states. Further, it has been consistently interpreted to "invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." C & A Carbone, Inc., 511 U.S. at 390. The skeleton of the dormant Commerce Clause was formed as processed goods entered the stream of commerce. Nevertheless, it is the travel of solid waste that spurs on the evolution of the clause. See Huish Detergents, Inc.

v. Warren County, 214 F.3d 707, 713 (6th Cir. 2000) (noting that garbage has become the "modern legal battleground" of the Commerce Clause). Notably, it is not the garbage that is valuable, as "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." Carbone, 511 U.S. at 383.

Carbone, the seminal decision in flow-control ordinances, controls the analysis here. Carbone also involved a flow-control regulation. Id. at 387. A New York municipality, struggling to enact a comprehensive waste-management scheme, contracted with a local private contractor to build a new transfer station for recyclables. Id. The private contractor was allowed to operate the transfer station and obtain the profits from "tipping" fees for five years. At the end of the five years, the city could purchase the landfill for a mere token fee. Id. The city enacted flow control ordinances which guaranteed a minimum flow of solid waste to the transfer station. Id. Carbone, the plaintiff, operated a similar transfer station within the city and challenged the ordinances on Commerce Clause

grounds. Finding that the ordinances did violate the dormant Commerce Clause, the Court explained that by permitting only the "favored" local operator to process the city's waste, the ordinance prevented any out-of-state waste company access to the local market. Id.

The County advances several arguments why the Ordinance is distinguishable from Carbone and its progeny and, therefore, is not facially discriminatory. The Court will address each argument in turn.

A. United Haulers and the Private/Public Distinction

The County encourages the Court to adopt the rationale of the Second Circuit in United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2d Cir. 2001). In United Haulers, the Second Circuit upheld a county's waste management plan that required that all solid waste and recyclables to be processed to an "[a]uthority designated facility." Id. at 250. The ordinance then designated five publicly-owned

facilities. United Haulers, a private waste collection company, challenged the ordinance as discriminatory against interstate commerce. Id. at 251. The United Haulers court found the undisputed public ownership of the facilities to be an important distinction from Carbone, as "[f]low control regulations...which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause." Id. at 263 (emphasis added); See also East Coast Recycling, Inc. v. City of Port St. Lucie, 234 F.Supp.2d 1259 (S.D.Fla. 2002) (utilizing the private/public distinction discussed in United Haulers). The Second Circuit reasoned that in Carbone, "the Justices were divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction." Id. at 259. Here, the County argues, the facility is clearly public and it negatively impacts all private businesses alike, both in-state and out-of-state.

The Court does not agree that the Carbone decision

turned on whether the facility was public or private. The minority criticized the majority for ignoring the fact that no benefit was bestowed on local private actors as a result of the flow control ordinance. They pointed out to the majority that the ordinance simply aided the government in satisfying a traditional governmental responsibility. Instead of being divided over whether the facility of public or private, it seems it simply did not matter to the majority that they facility was public.

The majority in Carbone focused instead on the effect of the flow control ordinance—that it hoarded solid waste, and the demand to get rid of it, for the benefit of the single local proprietor. The majority found that such a restriction discriminated against the stream of commerce, as "it allows only the favored operator to process waste that is within the limits of the town." Id. at 391. Because the movement of the waste was curtailed, the ordinance was per se discriminatory. Id. The Court found it immaterial that in-state processors and in-town processors were as affected by the prohibition as

out-of-state processors. Id. A State or locality may not "avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." Id. (quoting Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 361 (1992)). "The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside." Id. at 392.

This analysis has since been utilized by the Sixth Circuit to invalidate flow-control ordinances that restrict the interstate movement of solid waste. See Huish Detergents, Inc, 214 F.3d 707 (designation of the city's transfer station as the sole processing site for solid waste was a per se violation of the Commerce Clause); Waste Mgmt. v. Metro. Gov't of Nashville and Davidson County, 130 F.3d 731 (6th Cir. 1997) (ordinance that mandated that all of city's residential waste be processed at a publically owned recycling facility was a per se violation of the Commerce Clause). As Daviess County points

out, the Sixth Circuit has not directly addressed the public/ private distinction. However, until it does so, the prudent course is to follow Carbone, Huish and Waste Management, to find that the Ordinance discriminates against the interstate flow of solid waste. The Court declines the invitation to adopt the public/private distinction found in United Haulers.

B. Evenhanded Regulation

Daviess County also contends that because the Ordinance regulates evenhandedly, it does not discriminate against interstate commerce. Under the County Ordinance, all waste disposal companies, both in-state and out-of-state, are equally prohibited from disposing of or processing the County's solid. However, as discussed above, Commerce Clause analysis examines whether the ordinance at issue curtails the *movement* of the articles of commerce. Carbone, 511 at 391. It is "immaterial that in-state processors and in-town processors [are] equally affected by the prohibition." Id.

C. Market Preemption

"The Commerce Clause only grants to Congress...the power to regulate commerce. Because the power conferred...is the power to 'regulate,' the strictures of the dormant Commerce Clause are not activated unless a state action can be characterized as a 'regulation.' At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between 'regulation' of, and 'participation' in, a market." SSC Corp. v. Town of Smithtown, 66 F.3d 502, 510 (2d Cir. 1995), cert. denied, 116 S.Ct. 911 (1996). "If the state is buying or selling goods as any private economic actor might, then it is engaging in 'market participation' that by definition falls outside the scope of activity governed by the dormant Commerce Clause." USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996). "A state's actions constitute 'market participation' only if a private party could have engaged in the same actions." SSC Corp v. Town of Smithtown, 66 F.3d at 512.

Daviess County argues that the Ordinance is

constitutional because it has completely "eliminated the market" for solid waste disposal. With respect to waste disposal, the County has conceded that the complete foreclosure of the disposal market is an act of market regulation–an act only achievable through the use of its governmental powers. Nevertheless, Daviess County contends that under the analysis in USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996), the Ordinance is constitutional. Babylon invoked the distinction between market participation and market regulation in both the collection and the disposal of solid waste. Id. In Babylon, a municipality used its regulatory authority under New York statutes to hire a private waste hauler with public funds and then required all residents to use that hauler. Id. at 1282. Then, the waste hauler was permitted to dispose of a certain amount of waste at the town-owned incinerator at no cost. Id. at 1278-79. Other waste haulers were required to pay a tipping fee per load. Id.

The Second Circuit analyzed the municipality's

collection and disposal regulations separately. The court found that although Babylon's collection scheme constituted market regulation, it did not discriminate against interstate commerce because it completely eliminated the waste collection market by hiring a contractor with public funds. Id. at 1282. Furthermore, the court found that Babylon's disposal scheme was a constitutional act of market participation. Id. at 1288-89.

Daviess County attempts to draw a factual and legal comparison between the cases, but Babylon does little to advance the County's cause here. It should be noted that the "elimination of the market" in Babylon was the elimination of the waste *collection* market, not the disposal market. Regardless, its reasoning is instructive. Although the Babylon court found the decision to eliminate the collection market was market regulation, it did not discriminate against interstate commerce since the town did not favor in-state garbage haulers over out-of state competitors. It noted that no one enjoyed a monopoly position selling garbage collection service in Babylon—not even the town itself since it was not

a seller of the services. The town provided garbage collection, not as a business *selling* to a captive consumer base, but as a local government providing services to its residents. "In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in Carbone." Id. at 1283.

Applying the same reasoning to the regulation of the disposal market in this case, it is readily apparent that the County's attempt to regulate the disposal market discriminates against interstate commerce. Daviess County is not buying disposal services, it is selling disposal services to a captive consumer base. As NSWMA emphasizes, Daviess County's Ordinance compels market actors (the garbage collectors) to purchase disposal services from the County to the exclusion of interstate commerce. Daviess County enjoys a monopoly as the lone seller of disposal services in the market. The Ordinance favors the single local proprietor. The waste collectors cannot dispose of the waste at any other facility. As noted above, Carbone found it immaterial that in-state and

out-of state processors were equally affected by the prohibition. "Although *Carbone* dealt with waste processing, its holding applies with equal force to the waste disposal market, compelling the conclusion that the County violated the Commerce Clause by prohibiting out-of-state disposal." Huish at 716. Thus, unlike the elimination of the collection market in Babylon, the elimination of the disposal market in this case does discriminate against interstate commerce.

The County argues that since it is constitutionally permissible for it to eliminate both the local garbage collection market and the disposal market using public funds, there should be no impediment to eliminating just the disposal market. Simply put, however, the disposal market is different. If a municipality is in the collection market it is necessarily also in the disposal market. It may have to buy disposal services or if it has disposal services to sell, it can sell them to itself. However, if a municipality is not in the collection market, but is in the disposal market, it can only be in the disposal market as a seller. If it uses its regulatory power to force those who

are in the collection market to buy disposal services from it rather than from someone across the state line, then such regulation violates the Dormant Commerce Clause.

D. Legitimate Local Interests

For all of the foregoing reasons, the Court finds that the Ordinance is facially discriminatory against the interstate movement of solid waste. If a law discriminates against interstate commerce in favor of local interests, it is virtually per se invalid, unless "the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Carbone, 511 U.S. at 392; (citing Maine v. Taylor, 477 U.S. 131 (1986)).

Daviess County's interests are legitimate. The County has cited generally the deterrence of public waste dumping and widespread litter problems. Both the prohibition on public dumping and litter control are within the purview of a local government's traditional police powers. However, while the County suggests the Ordinance allows for low-cost

disposal services which helps to combat public dumping and litter problems, the County could more effectively combat these problems through no-cost disposal services. Thus, it appears there are other means to achieve these interests and the Ordinance does not survive "rigorous scrutiny."

III. CONCLUSION

For the foregoing reasons, this **IT IS HEREBY ORDERED** that the motion for summary judgment [15] by Plaintiff, NSWMA, is **granted**, and the motion for partial summary judgment [DN 16] by Defendant, Daviess County, is **denied**. The Court does hereby declare that the proposed Daviess County Ordinance 830.5 (2004) is unconstitutional and the County is permanently enjoined from enforcing the terms thereof.

UNITED STATES COURT OF APPEALS
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NUMBER: 4:04CV-31-M

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION
PLAINTIFF

V.

DAVIESS COUNTY, KENTUCKY
DEFENDANT

JUDGMENT

This matter having come before the Court on dispositive motions filed by the parties, and the Court having issued a Memorandum Opinion and Order granting the Plaintiff's motion for summary judgment,

IT IS HEREBY ORDERED that judgment be entered in favor of the Plaintiff consistent with the Court's Memorandum Opinion and Order.

THIS IS A FINAL AND APPEALABLE ORDER

AND THERE IS NO JUST CAUSE FOR DELAY

This the 22nd day of November, 2004.

JEFFREY A. APPERSON, CLERK

By:/s/ Erica A. Skinner
Deputy Clerk

No. 06-359

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVIESS COUNTY, KENTUCKY,
Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICI CURIAE* OF THE
BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE, CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY, DELAWARE COUNTY SOLID WASTE AUTHORITY, GREATER LEBANON REFUSE AUTHORITY, MONTGOMERY COUNTY, OHIO, SNOHOMISH COUNTY, WASHINGTON, SOLID WASTE AUTHORITY OF CENTRAL OHIO, SOLID WASTE DISPOSAL AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA, SPOKANE REGIONAL SOLID WASTE SYSTEM, and the YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY
IN SUPPORT OF PETITIONER

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In the

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BRIEF *AMICI CURIAE*
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Amici curiae Bristol Resource Recovery Facility Operating Committee, *et al.*, submit this brief in support of Petitioner Daviess County, Kentucky.[1] Daviess County's

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The Petitioner and Respondent have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

petition for a writ of certiorari seeks review of *National Solid Wastes Management Ass'n v. Daviess County, Kentucky*, 434 F.3d 898 (6th Cir. 2006) (App. to Pet. for Writ of Cert. ("App.") 1a-26a), in which the Sixth Circuit affirmed a district court order enjoining enforcement of Daviess County's "flow control" ordinance for management of municipal solid waste generated by the county's residents and businesses. The Daviess County ordinance requires waste haulers, such as Respondent's members, that collect municipal solid waste in Daviess County to deliver that waste to the county's publicly-owned waste management facilities.[2] The Sixth Circuit's decision invalidating Daviess County's flow control ordinance conflicts with the Second Circuit's decisions in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001) (*Oneida-Herkimer I)* and 438 F.3d 150 (2d Cir. 2006) (*Oneida-Herkimer II*), *cert. granted*, 2006 U.S. LEXIS 5414 (U.S., Sept. 26, 2006) (No. 05-1345).

STATEMENT OF INTEREST OF *AMICI*

Amici are local government authorities, counties and cities that have principal responsibility for municipal solid waste management in their respective communities. *Amici's* responsibilities are similar to those of Petitioner Daviess County, which has primary responsibility under Kentucky law for managing all municipal solid waste generated by the county's residents and businesses. Ky. Rev. Stat. Ann. § 109.011(6); *see also id.* §§ 67.083(3)(o) and 109.041(1) (counties' "governmental functions" include "[e]xclusive management of solid wastes by ordinance or contract or both" and "in the implementation, acquisition, financing, and maintenance of solid waste management facilities, and in the enforcement of their use, counties will be performing state

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[2] The term "municipal solid waste" refers to "residential and commercial solid wastes generated within a community." 40 C.F.R. § 240.101(q).

functions duly delegated to them for the public welfare."). Kentucky law also required Petitioner to develop a comprehensive waste management plan, which must include specific provisions to assure adequate waste management capacity. *Id.* § 224.43-345(1)(*l*)

To implement these responsibilities, Daviess County adopted a flow control ordinance, Ordinance KOC 830.5, which designated the county's publicly owned landfill for disposal of all non-recyclable waste. The ordinance was challenged in federal district court by Respondent, an association of privately-owned waste haulers and waste disposal facility operators, as allegedly discriminating against interstate commerce in violation of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). Citing this Court's decision in *C&A Carbone, Inc. v. Clarkstown, New York*, 511 U.S. 383 (1994), the district court agreed with Respondent's argument. In that regard, the district court rejected Daviess County's reliance on the Second Circuit's *Oneida-Herkimer I* decision. *Oneida-Herkimer I* ruled that a flow control ordinance designating publicly owned facilities for management of the affected community's solid waste is not facial discrimination under the dormant Commerce Clause, and should instead be evaluated under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to determine whether the burden, if any, the ordinance imposes on interstate commerce is clearly excessive in relation to the local benefits provided. Daviess County appealed to the Sixth Circuit, and that court affirmed the district court. Rejecting the contrary conclusion in *Oneida-Herkimer I*, the Sixth Circuit ruled that Daviess County's ordinance constituted facial discrimination against interstate commerce.

Although not considered by the Sixth Circuit, this Court has long recognized that authority over solid waste management is inherent in the police power of local government. *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Mich.*, 199 U.S. 325

(1905). The Resource Conservation and Recovery Act (RCRA) codifies the Court's longstanding recognition of that core local government responsibility, *see* 42 U.S.C. § 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies"), as do the laws of essentially every state.

Because the Nation's growing waste stream requires comprehensive planning by local government to address the broad range of public health, environmental and economic issues involved, a principal RCRA objective is the statute's prescription for detailed state and local solid waste management planning, including emphasis on assuring capacity adequate to meet the affected communities' "present and reasonably anticipated future needs." *Id.* § 6941; *see also id.* §§ 6902(a)(1), 6942 and 6943.[3] Such planning must address the broad range of public health, environmental and economic issues involved, and "present[s] these communities with serious financial, management, intergovernmental, and technical problems." *See id.* § 6901(a)(3). To effectuate their waste management decisions and secure financing for facility development, many local governments, including each of the *amici*, have enacted flow control ordinances; the ordinances implement

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[3] The volume of MSW generated in the United States has increased by more than 50 percent since 1980, exceeding 236 million tons in 2003 (the most recent year for which national data are available). *See Municipal Solid Waste in the United States: 2003 Facts and Figures*, U.S. EPA, *available at* http://epa.gov/epaoswer/non-hw/muncpl/pubs/msw05rpt.pdf. The U.S. Environmental Protection Agency (EPA) has noted RCRA's "great emphasis" on state, regional and local planning, which, among other things, "must provide for adequate recycling and disposal capacity and must address [waste management] facility planning and development." *Report to Congress on Flow Controls and Municipal Solid Waste*, EPA 530-R-95-008, U.S. EPA (Mar. 1995), at I-2, *available at* http://www.epa.gov/epaoswer/non-hw/muncpl/flowctrl.htm (cited below as "*Report to Congress on Flow Control*").

the affected local governments' determinations regarding the facilities that will best achieve the waste management strategies selected by their respective communities.

In that regard, state laws authorizing local government to adopt flow control ordinances emphasize protection of public health and the environment and comprehensive planning as the predicates for exercising flow control authority. Thus, in the exercise of inherent police power authority to determine the waste management system and facilities best suited for their communities (whether a recycling center, resource recovery – also referred to as "waste-to-energy" – facility, composting plant, waste transfer station or another type of waste management infrastructure), *amici's* flow control ordinances implement those decisions in the interest of public health and environmental protection, and assist in financing the costly, environmentally advanced infrastructure selected. Although it is not necessary to address here the circumstances surrounding each of the *amici's* use of flow control (descriptions of the *amici* are in the Appendix to this brief), *amici* would note that since 1980 a considerable number of local governments have issued, in reliance on flow control authority, more than $20 billion in bonds for the construction of state-of-the-art, environmentally protective waste management infrastructure.[4] Such environmentally advanced waste management systems are quite expensive and often extremely difficult to develop and operate without use of flow control.

These factors represent a reality of solid waste management which may be referred to as "The Second Law

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[4] *Hearing on Flow Control Laws and Proposals to Regulate the Interstate Transportation of Municipal Solid Waste Before the Senate Comm. on Environment and Public Works*, 105th Cong. (Mar. 18, 1997) (Testimony of Randy Johnson, Chair, Board of County Commissioners Hennepin County, Minnesota and President-Elect, National Association of Counties).

of Garbage": more specifically, absent government intervention, waste management will generally default to the lowest cost (in terms of short-term costs) and frequently less environmentally sound alternatives. *See Facing America's Trash: What Next For Municipal Solid Waste?*, U.S. Congress, Office of Technology Assessment, at 275 (Oct. 1989).[5] Flow control changes that dynamic by facilitating implementation of the waste management infrastructure alternatives selected by the affected community. While the community's choices may self-impose higher short-term expense, the use of flow control is a highly cost effective and efficient means for the community to counteract the attraction of the lower short-term costs of environmentally less preferable alternatives.

This is the context in which the Second Circuit concluded in *Oneida-Herkimer I* that *C&A Carbone* supports the position that a flow control ordinance's designation of publicly owned waste management facilities is not facial discrimination under the Commerce Clause. *See also Oneida-Herkimer II*, 438 F.3d at 162-63 ("[N]othing in the record before us demonstrates, or even suggests, that the Counties could address their liability concerns or encourage recycling across the wide range of waste products accepted by the Authority's recycling program in any other way, let alone through an approach as straightforward as the use of flow control."). In the decision below, however, the Sixth Circuit disagreed with *Oneida-Herkimer I*. Although the Sixth Circuit critiqued the Second Circuit's parsing of this Court's opinion in *C&A Carbone*, *see* 434 F.3d at 910, App. 22a, the Sixth Circuit sidestepped the Second Circuit's more important point, specifically, this Court's rationale in *C&A*

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[5] Those involved in solid waste management describe the "First Law of Garbage" as follows: "Everybody wants us to pick it up, and nobody wants us to put it down." *The Solid Waste Dilemma: An Agenda for Action*, U.S. Environmental Protection Agency, EPA/530-SW-8-019, at 8 (Feb. 1989) (cited below as "*Agenda for Action*").

Carbone, which placed heavy reliance on a considerable body of precedent, the "local processing cases," in which state laws were found to be facially discriminatory because they favored particular categories of private business activity within the enacting state and similarly disadvantaged private business activity located out-of-state.

The Sixth Circuit attempted to buttress its position by suggesting that local government responsibility for solid waste management is synonymous with "a local business in the local industry of waste disposal." 434 F.3d at 912, App. 26a. The Sixth Circuit repeated its position in several different ways, as follows:

> A municipality can be considered a local business in competition with out-of-state businesses, and a municipality can participate in local enterprise.
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> . . .
>
> But again, Daviess County is acting as a local business in the local industry of waste disposal. Not to belabor the point, but under the Ordinance, [Daviess County] would be acting in a dual role: as a local business selling waste disposal services, and as a local government hoarding "waste, and the demand to get rid of it, for the benefit" of this business.

Id. at 911-12; App. 23a, 25a-26a.[6] Suggesting that its position is required by *C&A Carbone*, the Sixth Circuit rejected the Second Circuit's conclusion in *Oneida-Herkimer I* that a flow control ordinance's designation of the affected community's publicly owned facilities for management of

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[6] Although the Sixth Circuit's rationale appears to be based on facial discrimination, the court suggests that "the crux of the inquiry is whether the local ordinance *burdens* interstate commerce." 434 F.3d at 911, App. 22a (emphasis added). *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298-300 (1997) (describing the meaning of discrimination for purposes of dormant Commerce Clause analysis).

the community's waste, to the exclusion of all private businesses, in-state as well as out-of-state, does not constitute facial discrimination under the dormant Commerce Clause. As *amici* show below, the Sixth Circuit's position is not required by this Court's decision in *C&A Carbone* and reflects a serious misunderstanding of local government responsibility for solid waste management as well as the manner in which that responsibility relates to the dormant Commerce Clause.

SUMMARY OF ARGUMENT

The Sixth Circuit's premise is that when a local government, such as Daviess County, uses flow control to implement state law responsibilities for solid waste management it "is acting as a local business in the local industry of waste disposal." That premise is fundamentally incorrect. Thus, contrary to the decision below, this Court's dormant Commerce Clause jurisprudence has consistently emphasized that discrimination against interstate commerce is predicated on favoritism extended to local (in-state) *private businesses* at the expense of similarly situated out-of-state *businesses*, and the imposition of a burden on interstate commerce that commerce within the state does not bear. Here, however, the flow control ordinance does not involve any such favoritism or disparate burden. Nor is there anything in the implementation of local government's core responsibility for solid waste management that bears any resemblance to the entrepreneurial activity of private businesses engaged in solid waste collection and disposal. Moreover, communities that rely on flow control provide distinctly different and considerably more comprehensive waste management services in comparison to the narrower waste collection-disposal service that Respondent's members provide. Those differences further preclude Respondent's claim of discrimination.

ARGUMENT

The Sixth Circuit Misapprehends Local Government Responsibility For Solid Waste Management And Its Relationship To This Court's Dormant Commerce Clause Jurisprudence

1. As an initial matter, it should be emphasized that local government responsibility for solid waste management, including the use of flow control authority, is precisely the opposite of the for-profit, entrepreneurial activity that is traditionally performed by private corporations. Thus, as noted above, solid waste management has longstanding recognition as a core function of local government. *See Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306; *Gardner v. Mich.*, 199 U.S. 325; *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1275 (2d Cir. 1995) (it is settled law that "garbage collection and disposal is a core function of local government in the United States"); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 804 (3d Cir. 1995) (local governments' authority for exercise of their police powers "are at their strongest in the health and safety area"); 42 U.S.C. § 6901(a)(4), *supra* (solid waste collection and disposal is "primarily" a state and local function).

The core local government responsibility for solid waste management recognized in RCRA is implemented through state law. Given the scores (if not hundreds) of applicable state laws, suffice it to say that state codes routinely mandate that local government is responsible for solid waste management. *See, e.g.*, 53 Pa. Cons. Stat. §§ 4000.303(a), 4000.304(a) (Pennsylvania municipalities have primary responsibility for processing and disposal of locally generated municipal waste); Wash. Rev. Code §§ 70.95.080 and 70.95.090(3) (each county to prepare a comprehensive solid waste management plan including "a program for the

orderly development of solid waste handling facilities in a manner consistent with plans for the entire county"); *see also* Conn. Gen. Stat. § 22a-220 (each municipality responsible for arranging for solid waste collection and disposal). These laws impose detailed planning and related responsibilities to assure adequate, environmentally protective waste management capacity. *See, e.g.,* Wash. Rev. Code § 70.95.010(6)(c) (county and city governments to assume primary responsibility for solid waste management and to develop and implement aggressive waste reduction and source separation strategies); Ohio Rev. Code Ann. §§ 3734.52(A) and (B), 3734.55 (each county required to participate in a solid waste district for the purpose, among other things, of preparing a solid waste management plan providing for proper management of municipal solid waste).[7] This delegation of solid waste management responsibility to local government is in furtherance of the states' police power authority for protection of public health, welfare, safety and the environment. *See, e.g.,* Ala. Code §§ 22-27-3 and 22-27-40(3); Conn. Gen. Stat. § 22a-258; N.J. Stat. Ann. § 13:1E-2(a); Ky. Rev. Stat. Ann. § 109.011(6).

It also bears emphasis that the predicate for exercising flow control authority under state codes is protection of public health and the environment and facilitating proper solid waste management. For example, as a prerequisite to exercise of flow control in Pennsylvania, a county's solid waste management plan must, among other things, "[e]xplain in detail the reason for selecting such facility," "provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or

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[7] *See also* Ala. Code § 22-27-47(b)(8) (county and municipal solid waste management plans required to provide for development or expansion of management systems "in a manner consistent with the needs of the area" and "protection of air, water, land, and other natural resources."); N.J. Stat. Ann. § 13:1E-20 (each county required to develop and implement a comprehensive solid waste management plan).

programs from among alternatives which were suggested to the county," and "[e]valuate [for the affected facility] the environmental, energy, life cycle cost, [and] the costs of transportation . . . as well as the [costs of the] alternatives." *See, e.g.*, 53 Pa. Cons. Stat. § 4000.502(f). Similarly, under Ohio law a predicate for use of flow control is authorization as part of the solid waste management plan for the affected county, which, in turn, requires state and local approval after public notice and comment and annual review. Ohio Rev. Code Ann. §§ 343.013 and 3734.55. Under the comparable Wisconsin statute a prerequisite to a municipality's use of flow control is a finding that flow control "is in the best public interest," which in turn requires a determination that use of the designated waste management facility will, among other things, conserve energy or natural resources, lessen the demand for solid waste disposal facilities, and that the alternatives to use of flow control "have been compiled, analyzed and considered." Wis. Stat. § 287.13.[8]

2. The preceding points describe the context for the Second Circuit's conclusion in *Oneida-Herkimer I* that a flow control ordinance which directs solid waste to publicly owned waste management facilities does not constitute facial discrimination under the dormant Commerce Clause. As noted earlier, in reaching that conclusion the Second Circuit emphasized this Court's heavy reliance on the "local processing cases" in its decision overturning the flow control ordinance at issue in *C&A Carbone*.

As the Second Circuit explained, "in each and every one of the local processing cases the challenged laws favored a local private business, industry or investment (not a state-

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[8] *See also* Minn. Stat. § 115A.84, subd. 2 (exercise of flow control authority requires affected local government to prepare a plan demonstrating that flow control "will better serve to protect public health and safety" and is necessary, among other things, to achieve local waste management plans and policies).

owned facility or a public monopoly) to the detriment of out-of-state competitors." 261 F.3d at 260. The Second Circuit also noted that this body of considerable precedent consistently "evidence[s] the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses." *Id.* In addition, the court emphasized that "[t]he common thread in th[is] Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases. . . , is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition." *Id.* at 261 (emphasis in original). Although many (perhaps all) laws and regulations of state and local government can benefit the economic well being of the enacting jurisdictions' citizens, nothing in Daviess County's flow control ordinance, or any other flow control ordinance of which *amici* are aware, is designed to benefit in-state interests by burdening any out-of-state interest. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995) (describing "the Commerce Clause's purpose of preventing a State from . . . plac[ing] burdens on the flow of commerce across its borders *that commerce wholly within those borders would not bear*") (emphasis added); *see also C&A Carbone*, 511 U.S. at 392 ("Put another way, the offending local laws hoard a local resource – be it meat, shrimp, or milk – for the benefit of local businesses that treat it.").

The importance of local government's traditional, core responsibility for solid waste management is all the more poignant to the issues in this case given the fundamental distinction between for-profit entrepreneurial activity and the public health and safety responsibilities that underlie flow control ordinances. Thus, regardless of restrictions that may arise under the dormant Commerce Clause when "the State is acting . . . [as] a traditionally 'private enterprise,'" such as "conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed

by private citizens and corporations, and that otherwise resembles the behavior of 'market participants,'" *see College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 684 (1999), none of those circumstances bear any resemblance to the use of flow control. To the contrary, the statutory obligations that local governments fulfill through the exercise of flow control authority are core governmental functions for protection of public health and welfare and are not, needless to say, a statutory obligation of any private enterprise engaged in solid waste collection or disposal. And in implementing its responsibilities, no local government can "pick out good portions of a particular territory, serve only select customers . . . , and refuse service to other users." *General Motors v. Tracy*, 519 U.S. at 297 (internal citation omitted); *see also*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 447 n.1 (1980), Powell, J., dissenting ("By 'protectionism,' I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market," and "I would exclude from this term policies relating to traditional governmental functions").[9] Simply put, local governments that rely on flow control do not undertake their solid waste management responsibilities for profit, entrepreneurial spirit or the like, but rather to satisfy one of their most basic governmental obligations.

3. Finally, the decision below is not in keeping with the Court's recognition in *General Motors v. Tracy* that under

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[9] Judge Calabresi's concurring opinion in *Oneida-Herkimer I* emphasizes the same point:

> I concur in both the result and the opinion. I do so because this case deals with waste processing by a publicly owned facility. Waste disposal is both typically and traditionally a local government function . . . . Whether the same analysis would apply to activities that are not traditionally governmental is not before us.

261 F.3d at 264.

the dormant Commerce Clause "any notion of discrimination assumes a comparison of substantially similar entities." 519 U.S. at 298. The Court addressed this matter as follows:

> Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

Id. at 298-99; *see generally id.* at 297-303. The importance of comparing substantially similar entities has particular application in the context of flow control. That is because communities which rely on flow control typically provide a comprehensive array of waste management services that go well beyond the narrower and allegedly competing waste collection-disposal service that underlies Respondent's claim of discrimination. *See* 434 F.3d at 901, App. 3a.

More specifically, the services provided by local governments that rely on flow control (including each of the *amici*) will typically comprise, in addition to disposal of non-recyclable waste, a number of environmentally-essential services such as recycling, household hazardous waste programs, yard waste collection and related educational programs. Such recycling and related services are referred to as "integrated waste management."[10] Because these services

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[10] As noted in EPA's *Agenda for Action* at 16, "'integrated waste management' [IWM] refers to the complementary use of a variety of waste management practices," including reuse of products, recycling of materials, waste-to-energy combustion and landfilling "to safely and

"generally do not lend themselves to generation of their own revenues," *Report to Congress on Flow Control* at ES-11 (*see also id.* at III-80), the affected local governments charge a "system" fee which, although imposed only on disposal of non-recyclable waste, supports the full array integrated waste management services provided. Thus, as explained in *The Cost of Flow Control*, New Hampshire Department of Environmental Services (Nov. 1995) (cited below as "*NHDES Report*"), the system fees charged by flow control-reliant communities will almost always recover, in addition to the cost to dispose of non-recyclable waste, the costs of environmentally-essential services such as recycling, household hazardous waste collection and public education. *NHDES Report* at 1.[11] The same point is addressed by EPA in its *Report to Congress on Flow Control*, which explains that "[d]ue to flow control," the system fees local governments use in conjunction with waste-to-energy facilities "often recover other municipal system costs (e.g., curbside recycling). In contrast, private regional landfills are more likely to set tipping fees at (lower) levels that recover disposal costs only." *Report to Congress on Flow Control* at III-51.[12]

Putting this matter in context, the *NHDES Report* emphasizes that the integrated waste management services

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effectively handle the municipal solid waste stream with the least adverse impact on human health and the environment."

[11] As required by Rule 32.3, on September 18, 2006 *amici* submitted a letter to the Clerk of the Court requesting permission to lodge the *NHDES Report* with the Court.

[12] "Tipping fee" refers to the waste disposal charge or gate fee at a disposal facility. *See Oneida-Herkimer I*, 261 F.3d at 249. The NHDES report also explains that because "[t]he public typically views IWM programs funded through [system] fees as a 'free' addition to locally provided waste management service . . . , they tend to use these programs more heavily than if recycling, HHW [household hazardous waste] collection, composting, and other IWM programs were billed on a fee-for-service basis." *NHDES Report* at 1.

provided by flow control reliant communities are "probably the single most important variable that differentiates public, flow-controlled facilities from private disposal sites." *NHDES Report* at 2. Thus, in contrast to the narrower waste collection-disposal service that underlies Respondent's discrimination claim, communities that rely on flow control provide distinctly different and considerably more comprehensive waste management services. Such substantial dissimilarity precludes "any notion of discrimination." *See General Motors*, 519 U.S. at 298.

In sum, the Sixth Circuit erroneously concluded that Petitioner's flow control ordinance discriminates against interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix
Descriptions of *Amici Curiae*

Bristol Resource Recovery Facility Operating Committee (BRRFOC) was established in 1985 to advance integrated waste management in fourteen Connecticut cities and towns with an estimated population of more than 300,000. BRRFOC has relied on flow control authority as a fundamental tool for its integrated waste management system, which includes public education on waste reduction and avoidance, recycling and household hazardous waste collection, and a state of the art waste-to-energy (WTE) facility generating electric power for approximately 15,000 homes.

Established in 1972, Cape May County Municipal Utilities Authority (CMCMUA) provides solid waste management (and sanitary wastewater treatment) for all municipalities of Cape May County, New Jersey (peak summer population of more than 600,000). CMCMUA's integrated solid waste management system, which has traditionally relied on flow control, includes a sanitary landfill and waste transfer station, as well as aggressive recycling (which achieved a 59% recycling rate in 2005), waste reduction and reuse and household hazardous waste collection programs (CMCMUA also reclaims energy through landfill gas recovery). CMCMUA's system fee on solid waste disposal subsidizes all recycling, waste reduction and educational programs.

The Delaware County Solid Waste Authority was established in 1954. Serving a county of more than 555,000 residents in populous southeastern Pennsylvania, the Authority's integrated waste management programs were established in reliance on flow control authority and emphasize waste reduction and recycling and the use of best available technology, including a modern WTE facility that began operation in 1992.

Formed in 1959, the Greater Lebanon Refuse Authority (GLRA) serves twenty-six municipalities in south-central Pennsylvania. GLRA has relied on flow control authority to provide environmentally advanced integrated waste management for its residents and businesses. Those programs include an aggressive recycling program (which achieved a 58% recycling

rate in 2005), composting, operation of a modern landfill and a renewable energy power production facility (fueled by landfill gas).

Montgomery County, Ohio provides integrated solid waste management for the approximately 500,000 residents of the Greater Dayton area, including various recycling, waste reduction and waste disposal services. The County's innovative waste management solutions date back to the 1960s with the construction of two waste combustion facilities that began operation in 1970. Despite long-term reliance on flow control authority, the uncertainties associated with the *C&A Carbone* decision prevented the County from proceeding with planned retrofits of its waste combustion plants.

Snohomish County, Washington (population approximately 650,000) is in the central Puget Sound region approximately 30 miles north of Seattle. The County disposes of municipal solid waste generated within its borders through a competitively bid contract. The County works in cooperation with its cities and towns to provide environmentally responsible solid waste disposal, solid and household hazardous waste recycling, prevent illegal dumping, and assure cleanup and monitoring of closed landfills.

The Solid Waste Authority of Central Ohio (SWACO) serves Franklin County (Columbus) and parts of five surrounding counties, with a population of over 1.2 million. Since its inception in 1989, SWACO has been a catalyst for recycling and cutting-edge programs to find new uses for waste. Despite long-term reliance on flow control, uncertainties resulting from the *C&A Carbone* decision prevented SWACO from upgrading its 2,000 ton-per-day WTE plant, which was instead required to shutdown. Today SWACO's comprehensive solid waste management plan addresses operation of its landfill and transfer stations and provides a variety of recycling and waste minimization services.

Serving a population of 270,000, the Solid Waste Disposal Authority of the City of Huntsville, Alabama operates a 690 ton-per-day WTE (steam) plant, curbside recycling, landfill gas recovery, metals recovery, sewage sludge incineration, and household and household hazardous waste programs. In reliance on flow control, the Authority has issued $121 million in bonds,

and all Authority services are financed from system fees and steam sale proceeds.

Protection of the environment was a primary consideration in the development of the Spokane Regional Solid Waste System (RSWS) by the City of Spokane and Spokane County, Washington. Reliance on flow control authority and an integrated system fee have been principal factors in implementing the Spokane RSWS, which provides regional solid waste reduction, recycling, recovery of energy from waste, composting and household hazardous waste collection in an environmentally safe and cost-effective manner.

The York County Solid Waste and Refuse Authority was established in 1971 to assure environmentally sound management for all municipal solid waste generated in York County, Pennsylvania. Serving a population of more than 400,000, from its inception the Authority's programs have emphasized waste reduction and recycling and use of best available technology, which led to development of a modern WTE facility that began operation in 1989. To avoid reliance on taxes while securing sufficient revenue to support WTE technology's greater cost (as well as the cost of recycling and household hazardous waste collection programs, which are provided without charge), York County adopted flow control in 1989 with the full endorsement of the affected communities.